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REPORTS OF CASES

DECIDED BY THE

SUPREME COURT

OF

MISSISSIPPI,

AT THE

MARCH and OCTOBER TERMS, 1896, and MARCH TERM, 1897.

Vol. 74.

REPORTED BY
T. A. McWILLIE.

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Rec. Feb. 17, 1898.

OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. TIM E. COOPER,
HON. THOMAS H. WOODS, } . . . JUDGES.
HON. ALBERT H. WHITFIELD, }

JUDGE COOPER, having been for the longest time continuously a member of the court, was, by operation of law, chief justice, and presided as such.

On December 1, 1896, JUDGE COOPER having resigned, HON. THOMAS R. STOCKDALE was appointed in his stead for the unexpired term, and the court was thereafter constituted as follows:

HON. THOMAS H. WOODS,
HON. ALBERT H. WHITFIELD, } . . . JUDGES.
HON. THOMAS R. STOCKDALE, }

As JUDGE WOODS had been for the longest time continuously a member of the court, he was, by operation of law, chief justice, and presided as such.

On the expiration of JUDGE STOCKDALE's term, May 10, 1897, HON. SAMUEL H. TERRAL was appointed to fill the vacancy, and the court was thereafter constituted as follows:

HON. THOMAS H. WOODS,	}	. . . JUDGES.
HON. ALBERT H. WHITFIELD,		
HON. SAMUEL H. TERRAL,		

For the reason before stated, JUDGE WOODS continued to be chief justice, and presided as such.

WILEY N. NASH,	. . . . .	<i>Attorney-general.</i>
T. A. McWILLIE,	. . . . .	<i>Reporter.</i>
E. W. BROWN,	. . . . .	<i>Clerk.</i>

CIRCUIT JUDGES.

<i>First District,</i>	.	.	.	HON. EUGENE O. SYKES.
<i>Second District,</i>	.	.	.	HON. THADEUS A. WOOD.
<i>Third District,</i>	.	.	.	HON. Z. M. STEPHENS.
<i>Fourth District,</i>	.	.	.	HON. FRANK A. MONTGOMERY.
<i>Fifth District,</i>	.	.	.	HON. W. F. STEVENS.
<i>Sixth District,</i>	.	.	.	HON. W. P. CASSEDY.
<i>Seventh District,</i>	.	.	.	HON. ROBERT POWELL.
<i>Eighth District,</i>	.	.	.	HON. A. G. MAYES.
<i>Ninth District,</i>	.	.	.	HON. W. K. MCLAURIN.
<i>Tenth District,</i>	.	.	.	HON. GREEN B. HUDDLESTON.

HON. EUGENE O. SYKES succeeded HON. NEWNAN CAYCE
March 1, 1897.

HON. THADEUS A. WOOD succeeded HON. S. H. TERRAL
May 10, 1897.

HON. Z. M. STEPHENS succeeded HON. EUGENE JOHNSON
September 26, 1896.

HON. FRANK A. MONTGOMERY succeeded HON. R. W. WIL-
LIAMSON September 26, 1896.

HON. W. F. STEVENS succeeded HON. C. H. CAMPBELL No-
vember 15, 1896.

HON. GREEN B. HUDDLESTON succeeded HON. JOHN W.
FEWELL August 3, 1896.

CHANCELLORS.

<i>First District,</i>	.	.	.	HON. BAXTER MCFARLAND.
<i>Second District,</i>	.	.	.	HON. N. C. HILL.
<i>Third District,</i>	.	.	.	HON. CLAUDE PINTARD.
<i>Fourth District,</i>	.	.	.	HON. B. T. KIMBROUGH.
<i>Fifth District,</i>	.	.	.	HON. H. C. CONN.
<i>Sixth District,</i>	.	.	.	HON. A. M. BYRD.
<i>Seventh District,</i>	.	.	.	HON. A. H. LONGINO.

HON. A. M. BYRD succeeded HON. T. B. GRAHAM, deceased,
January 26, 1897.

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CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI,

—AT THE—

MARCH TERM, 1896.

WEIMER, WRIGHT & WATKINS *et al.* v. C. M. SCALES, RECEIVER.

1. ASSIGNMENT FOR CREDITORS. *Jurisdiction of chancery court. Assignee as receiver. Code 1892, §§ 117, 118, 119.*

Under §§ 117, 118, 119, code 1892, which provide that, within twenty-four hours after taking possession, the assignee, in every general assignment for the benefit of creditors where the value of the assigned property exceeds \$1,000, shall file his petition and bond in the chancery court, and, on the approval of the bond, shall be a receiver of the court, no jurisdiction over said property is acquired by said court until such petition is filed and bond approved, and, until then, creditors may attach the same in the hands of the assignee.

2. SAME. *Assignment filed for record.*

The filing of a general assignment for creditors for record in the office of the clerk of the chancery court is not such a compliance by the assignee with §§ 117, 118, 119, code 1892, as will vest that court with jurisdiction over the assigned property.

3. SAME. *Rights of attaching creditors.*

When the assignee in a general assignment has filed his petition, together with a duly approved bond, under §§ 117 and 118, code 1892, the jurisdiction of the chancery court attaches to the assigned property, and that court will draw to it the determination of all controversies in which liens thereon are asserted, including attachments levied thereon.

Brief for appellants.

FROM the chancery court of Noxubee county.

HON. T. B. GRAHAM, Chancellor.

N. Scales, who was doing a mercantile business at Macon, Miss., made a general assignment for his creditors, to C. M. Scales, assignee. The assignee took immediate possession of the property assigned and filed the deed of assignment for record in the chancery clerk's office, and began the preparation of his petition and bond as required by chapter 8 of the code of 1892. Before the petition and bond were filed, but after the deed of assignment had been filed for record, Weimer, Wright & Watkins sued out a writ of attachment and had it levied upon the stock of goods in the custody of the assignee. The assignee having filed his petition and bond, demanded possession of the goods, which was refused. The assignee then filed a petition to restrain the attaching creditors from further interference with said property, and to require the sheriff to release his levy. The petition set up the foregoing facts, which were admitted by the answers of the defendants. On the petition, the chancellor made an order restraining appellants from further interference with said property, and requiring appellants to appear before the chancellor in vacation, to show cause why said levies should not be released and they dealt with as for a contempt. The parties appeared before the chancellor, and the case was heard on an agreed state of facts, as above set out. On the hearing, the chancellor rendered an order peremptorily requiring appellants to release said goods, and restore the possession to the assignee. Weimer, Wright & Watkins thereupon appealed.

Critz & Beckett & Jones, for appellants.

Under the code of 1892, §§ 117, 118, the assignee is required to file his petition in the chancery court within twenty-four hours after taking possession. Upon the filing of the petition and the approval of the bond, "the assignee becomes receiver, and shall not be sued," etc. (§ 119). The assignee

Brief for appellants.

is not required to wait twenty-four hours before filing his petition and bond, but may file them contemporaneously with the acceptance of the assignment (§ 117). He is not required to file the assignment at all, except as a part of his petition in the chancery court. He filed it, not in the chancery court, but for record, under §§ 2457 and 4226 of the code of 1892, to give notice to creditors and purchasers. There is nothing in the chapter on assignments which requires the assignment to be recorded. That is a matter entirely independent of the assignment law. The chancery court acquires no jurisdiction and has absolutely nothing to do with the matter till the petition is filed and bond approved by the clerk, and not till then does he become a receiver.

The claim that the receivership relates back to the date of the assignment cannot be sustained, for several reasons: (1) The assigneeship, when the petition and bond is filed, does not become merged in the receivership. *Shoe Co. v. Sykes*, 72 Miss., 404. (2) It is impossible to conceive of a receivership relating back to a time when there was no case pending, for it is of the essence of receivership that there shall be a case pending. He acts in aid of the court in a particular case and cannot exist without the case. (3) The language of the statute itself is that the assignee shall become a receiver "on the filing of his petition and the approval of his bond" (§ 119). (4) It would be unconstitutional to hold that it relates back. It would give the assignor and assignee twenty-four hours in which to remove or dispose of the property, with no power in any court on earth to interfere. It would amount to a stay law for that time. The bill of rights provided that "all courts shall be open and every person . . . shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay." Again, "No person shall be debarred from prosecuting . . . any civil action for himself before any tribunal of this state." Const., art. 3, secs. 24, 25. A stay law which debars a man from the use of the courts is un-

Brief for appellants.

constitutional. *Coffman v. Bank*, 40 Miss., 36. Where two courts have concurrent jurisdiction, the one which first gets the actual jurisdiction is entitled to the full and exclusive jurisdiction till the litigation is ended. *McPike v. Wells*, 54 Miss., 136. The question is perhaps more sharply defined in the United States court than others. In that court it is held that it is not a question of right or paramount lien, but a question of time, and the court which first gets the actual jurisdiction by a seizure of the property is entitled to retain it as to that property. *Wiswall v. Sampson*, 14 How., 61; *Smith v. McIver*, 9 Wheat., 532; *Hagan v. Lucas*, 10 Pet., 400; *Peck v. Jenness*, 7 How. (U. S.), 612; *Freeman v. Howe*, 24 How., 450. Prior liens are not displaced by the appointment of a receiver. High on Receivers, sec. 138.

The sheriff levied the attachments before the assignee filed the petition and bond. We wish to emphasize the word assignee, because the statute says the petition and bond is filed by "the assignee," not the receiver. So, up to that time, he is certainly not a receiver, but becomes so by that act. Code 1892, § 119. Up to that time he had not become an officer of court. To hold otherwise would present a remarkable incongruity. If the attachment is levied before the twenty-four hours expire, and the assignee does not give bond, the attachment is good, otherwise not. In other words, the assignee can play fast and loose with the attachment lien and the jurisdiction of the courts. If the assignee files his petition and bond after the levy, and before the expiration of the twenty-four hours, the sheriff is in contempt of court, but if the assignee does not file his petition and bond within that time, the sheriff is not only not in contempt, but has performed a praiseworthy act of duty. His guilt does not depend on what he does but what some one else does afterwards. Before the petition and bond is filed, the creditor cannot file the cross petition under § 121, for the cross petition implies that the petition has been filed. The creditor can, however, go into any court having

Brief for appellee.

jurisdiction in an original suit. 71 Miss., 102. If it is in the circuit court, the chancellor can either permit the suit to proceed to judgment and require the plaintiff to come into the chancery court for its satisfaction, or can require the plaintiff to come at once and enjoin him from proceeding in the circuit court.

It has been the common practice in cases of assignment in this state, since the case of *Bishop v. Rosenbaum*, 58 Miss., 84, for the assignee, or some of the nonattaching creditors, to file bills in the chancery court, and bring all the attaching creditors into that court, so that the whole matter, and all priorities, could be settled in the same suit. We do not deny that the chancellor had power, on a proper petition by the assignee, to enjoin us from proceeding in the circuit court, and requiring us to come into the chancery court, and bring with us and set up whatever lien we had acquired, but we do deny his right to peremptorily order the sheriff to release his levy and thus destroy our lien altogether in this summary way.

J. E. Rives, for appellee.

The chancellor held that an attachment under the facts in this case, creates no lien upon the property superior to the rights of the assignee. It was the evident intention of the legislature to give the chancery courts exclusive jurisdiction over the assignment and all the property assigned. Code 1892, ch. 8, § 117, expressly states that assignments are "to be administered in chancery." The next section provides that he shall give bond, and upon giving bond he becomes a receiver of the chancery court. This is the case whether the assignment is void or not. Creditors have their remedy by cross petition. Section 119 gives the assignee all the rights and privileges of other receivers in chancery. It is contended that until he gives his bond and files his petition, he is not a receiver of the court. To uphold this contention would be putting it within the power of creditors to defeat the operation of the statute. If one creditor has the right to say by his attachment that the circuit

Brief for appellee.

court shall administer his claim, and levy upon a sufficient amount of property to cover it, why could not all the creditors do the same, and, if so, what other result could follow except that they would have the power to take the property out of the chancery court, in open defiance of the statute. Upon the assignee giving bond and filing his petition within the time allowed by statute, he becomes a receiver of the court, and his office as receiver dates back to the filing of the assignment for record. I have been unable to find any expression of opinion by this court upon the question at issue, but the decisions of other states uphold the ruling of the chancellor that the assignee becomes a receiver of court from the time the assignment was filed for record, upon his giving bond and filing his petition as required by law. In the state of Wisconsin, where the statute requires the assignee to give bond before taking possession, and is allowed twenty days to file an inventory, it was held that if the inventory is filed, as required, it relates back to the time when the assignment was executed, and forms part of it. That is, the rights of the parties are the same as if the inventory was filed at the time of the assignment. *Conlee Lumber Co. v. Ripon L. & M. Co.*, 66 Wis., 481; *Shakman v. Schleuter*, 77 Wis., 402; *Hanson v. Dunn*, 76 Wis., 455.

In the state of Arkansas, the statute requires that before the assignee shall have control of the property, he shall file his inventory and execute his bond; yet it has been held that title vests in the assignee upon delivery of the deed and before the filing the schedule and bond, even against execution creditors without registration. *Thatcher v. Franklin*, 37 Ark., 64; *Falconer v. Hunt*, 39 Ark., 68; *Wolf v. Gray*, 53 Ark., 75; *Raleigh v. Griffith*, 37 Ark., 150; *Rice v. Frazer*, 24 Fed. Rep., 460; *Aaronson v. Deutch*, *Ib.*, 465; *Bartlett v. Teak*, 1 McCrary, 176.

In New York and Missouri, see *Kilpatrick v. Dean*, 15 Daly, 182; *Hardcastle v. Fisher*, 24 Mo., 70; *Duval v. Raisin*, 7 *Ib.*,

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449. *Schofield v. Folsom*, 38 Pac. Rep., 251, Annual Digest for 1895, a New Mexico case, directly in point.

Argued orally by *G. M. Jones*, for the appellants.

WOODS, J., delivered the opinion of the court.

Is an attachment maintainable in case of levy after the execution of an assignment but before the assignee has filed his petition and bond? Section 117, code of 1892, declares that the assignee "shall, before he enters upon the discharge of his duties, after taking possession, and within twenty-four hours thereafter, file a petition in the chancery court," etc., to which petition the assignor and all of his creditors must be made parties. Section 118 requires that bond must be filed with the petition, which is to be conditioned and approved as therein directed, and § 119 declares that, upon the filing of the petition and the approval of the bond, the assignee shall become a receiver of the court, and shall be entitled to all the rights and privileges and subject to all the duties and obligations of other receivers in equity, and "shall not be sued in any other court, save by permission of the court or chancellor, in vacation."

The code chapter on the subject of assignments has some peculiarities. The assignee is not made receiver from the date of the execution of the assignment. He becomes such officer of the chancery court only after he has filed his petition and bond and the latter has been approved. Thereafter he is entitled to the rights and privileges of a receiver, and may not be sued in any other court, save by permission of the court whose officer he has become, or that of the chancellor in vacation. Furthermore, there is no requirement that the assignment shall be filed as a step in the proceedings by which the chancery court acquires jurisdiction of the assigned estate, nor, indeed, that it shall be filed at all by the assignee. And again, the chapter, while committing the administration of the estate to the chancery court, nevertheless invites attack upon the assignment itself by creditors of the assignor.

Syllabus.

Now, in the present case, before the assignee had filed his petition and bond, and before any step had been taken by him to give the chancery court jurisdiction (for the filing for record of the deed of assignment in the proper office was, as the transcript perfectly shows, done simply to comply with our registry laws), the appellants sued out their attachment writs and had the same properly levied upon parts of the assigned property. And this they had the right to do. For, while the chancery court is clothed with the exclusive jurisdiction in cases of assignments, the jurisdiction had not been acquired when the attachment writs were levied.

But since the chancery court of Noxubee county has now acquired jurisdiction of the estate assigned, the fund must be administered under the direction of that court, and the decision of the questions involved in the attachment suits should be drawn to the court having jurisdiction in the administration of the estate. The rights of the parties should be determined in the equity court. The attachment suits should be drawn into that court, but the liens acquired, if any, by the levies of the attachments should be preserved and enforced. See *Pollock v. Okolona Savings Institution*, 61 Miss., 293.

Reversed and remanded.

PETER FINK v. J. L. HENDERSON.

1. ASSIGNMENT. Decree on publication. Rehearing. Right of defendant's assignee. Code 1892, §§ 519, 520.

The right given by §§ 519, 520, code 1892, to nonresident defendants against whom a final decree has been rendered on proof of publication only, to apply for a new hearing of the cause within two years thereafter, is assignable.

2. SAME. Defendant's grantee.

A conveyance of land vests in the grantee by way of assignment all the rights of action and defense that his grantor had in respect thereto.

Brief for appellant.

FROM the chancery court of Hancock county.

HON. W. T. HOUSTON, Chancellor.

Peter Fink filed his bill in the chancery court of Hancock county seeking a confirmation of a tax title to the land described in his bill. Clara Marks and all persons having an interest in the lands were made parties defendant. No personal service was obtained on any of the defendants, but publication was made for them according to law. No answer was filed, and a decree *pro confesso* and a final decree were taken, according to the prayer of the bill, confirming the tax title. A little over a year after the confirmation of the tax title, J. L. Henderson filed the petition in this case, seeking to reopen the decree, under §§ 519, 520, of the code of 1892. The petition alleged that at the time the bill was filed to confirm the tax title, the lands described therein belonged to the heirs of C. B. Beverly, setting out the chain of title, and averring that said Beverly died intestate, and the property descended to the heirs named in the petition; that they were nonresidents and knew nothing of the confirmation proceedings, and at that time had a good and complete defense to that suit; that before the petition was filed, the said Beverly heirs sold and conveyed the lands to petitioner. Defendants demurred to this petition, and the demurrer was sustained. Complainant amended, having, in the meantime, taken an assignment of the right of action and the right of the Beverly heirs to reopen the decree, and set them up as an exhibit to the amended petition. A demurrer was interposed to this amended petition, on the ground, among others, that the petitioner was not the owner of the land at the time of the commencement of the suit, or at any other time. This demurrer was overruled, and defendant appealed.

E. J. Bowers, for appellant.

Sections 519 and 520 of the code of 1892 prescribe the terms on which a decree rendered upon proof of publication may be reopened. By section 520 it is clear that the right to inter-

Brief for appellee.

vene in a suit passed as this was is confined to the defendants of record. The petitioner was not a party to the suit. On the face of his petition he had no interest in the subject-matter, either at the time of the rendition of the decree or when the land was sold for taxes. He was not interested, in the meaning of the law. The question is whether, under the terms of the statute, he who purchases after the rendition of decree may avail himself of the privilege reserved solely for the benefit of defendants of record. The law was designed for the protection of nonresidents sued *in rem* in the state from the operations of decrees rendered against them without their knowledge, and not to be made the means of promoting litigation and inciting champertous contracts. At the time of filing the original petition the appellee was the holder merely of defendants' right to the land—such right as they had. They had no right in fact. Their right had been stripped from them by the operation of the tax deed and decree. They had no title—no legal interest—that could be conveyed. No deed emanating from them could confer any rights upon appellee. They had no right of action. They had only a right of defense, which was not assignable even under our broad statute. Nor did they seek to assign this right until after the original petition had been filed. The statute is to be strictly construed, and appellee is not entitled to prolong or reopen this litigation.

Henderson & Henderson and Ford & Ford, for appellee.

We submit that there is nothing in the general policy of the law, as announced by the courts of this state, on the question of the assignability of rights, or choses in action, that calls for any such strict or rigid construction of § 520 of the code, as contended for by complainants. The deed from the Beverlys to Henderson vested in him the entire estate of the Beverlys in the land, and inseparably connected with the ownership is the right to sue for possession, and incidental to that right is the right to appear and procure the annulment of this illegal de-

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cree. This was a right of defense, which we submit is synonymous with a right or cause of action, and that right or cause of action, unless it be for a tort, is assignable.

Section 520 is not in the category of laws calling for an interpretation. Its terms are plain. It contravenes no rule or principle of common law, and should be construed to meet the manifest intention of the legislature—that is, to permit no decree resting upon constructive notice to debar a timely application by the owner of the *res* for a full and fair investigation into the facts of complainant's claim. There never was but one principle of the common law that forbade the assignment of rights of this character, namely, champerty, and that has long since been abolished in this state. Sec. 2423, code of 1892; *Cassedy v. Jackson*, 45 Miss., 397.

Besides this statute, which strikes down every restraint upon the alienation of property, whether in possession or not, it has always been the general policy of this state to facilitate the transfer of property, whether by assignment or otherwise, and to extend to the assignee, or purchaser, every remedy given by the statute to the original holder. For instance, the codes of Mississippi prior to that of 1892, gave the assignee of the holder of a mechanic's lien a right to enforce the lien, but they all provide in express terms that the remedy was conferred upon the "contractor alone." See code of 1871, § 1604; code of 1880, § 1379. Yet the court has held such lien to be assignable, and that the assignee could enforce the remedy. *Kerr v. Moore*, 54 Miss., 286. It was also held in the same case that a lien given a laborer was assignable, also a landlord's lien. *Newman v. Bank*, 66 Miss., 323. The fact that the petition does not negative the idea that Henderson knew, when he bought the land, of the existence of the suit and decree, does not affect his case, if he was otherwise entitled to pursue this remedy. *Jacks v. Bridewell*, 51 Miss., 887.

WHITFIELD, J., delivered the opinion of the court.

Appellee's quitclaim deed invested him with the title to the

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land, and, as a necessary incident thereof, with the right to make any defense to the bill to confirm the tax title asserted against these lands which the grantees in such deed could have made. The grantors, if the statements of the amended petition, the demurrer to which was overruled, be true, were the "unknown nonresident owners of the lands," and, as such, parties defendant, by publication, to the bill; and their deed to appellee not only invested him with such title, but operated as an assignment to him of all rights of action or defense growing out of such title and ownership of said lands which had theretofore belonged to the grantors (assignors). The word "defendants," in §§ 519 and 520, code 1892, must be reasonably construed to embrace not only the "defendants" to the record, but all who succeed to their rights by assignment. The policy of our laws has been, increasingly, to facilitate the transfer of property by assignment and otherwise, and to invest assignees fully with all the remedies had by their assignors. Neither the general policy of our legislation touching the assignability of rights or choses in action, nor the manifest purpose of these particular sections, warrants the narrow construction that the right to reopen such decrees, passed on proof of publication only, against nonresident or unknown defendants, within the time prescribed, is to be limited to those only who are parties defendant to the bill, either known and named or unknown and unnamed, and proceeded against by publication as unknown. Appellee's grantors were, according to the allegations admitted by the demurrer, owners of the land at the time of the filing of the bill, and made appellee a deed before he filed his petition asking to be allowed to reopen the decree and file an answer. We think he was, by this deed, invested with all the rights of action or defense that the several heirs theretofore had, quite independently of the written assignment of February 6, 1895. As illustrative of the liberal policy of our jurisprudence on this subject, see § 2433, code of 1892, permitting the conveyance of land adversely held; *Kerr v. Moore*, 54 Miss., 286, as to the

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assignability of a mechanic's lien and a laborer's lien, the latter under the act of April 5, 1872 (Acts 1872, p. 131). See, also, code 1871, § 1604 (code 1880, § 1379), which provided that the building, etc., should be liable to the "contractor alone," unlike the code of 1892, § 2699, which provides expressly for the enforcement of the lien in favor of the assigns of the "person employed;" and *Newman v. Bank*, 66 Miss., 323, as to assignability of landlords' and laborers' liens. The action of the chancellor was in accord with these views, and the decree is

Affirmed and remanded.

NICHOLAS V. BODDIE v. E. H. PARDEE ET AL.

1. EVIDENCE. *Land patents. Book of entries of issuance. Copies therefrom primary evidence. Code 1892, § 1784.*

Under § 1784, code 1892, certified copies from the book of entries in the office of the land commissioner of the state, showing the issuance of patents, are primary evidence, and admissible in the same manner and with the same effect as the original patent.

2. TAX TITLES. *Redemption. Limitation of act of 1888. Laws, p. 40.*

The act of March 2, 1888, entitled "An act to quiet and settle the title to certain lands in the Yazoo delta," etc. (Laws, p. 40), relates entirely to title, and the right of the owner of lands sold for taxes to redeem the same within one year after attaining his majority, is not affected by the provision of said act barring all proceedings for the recovery of any of said lands against one who has occupied the same for twelve months after the passage of said act, under a deed from the commissioners in *Green v. Gibbs*, or the auditor's deed designated in said act.

FROM the chancery court of the first district of Coahoma county.

HON. W. R. TRIGG, Chancellor.

Nicholas V. Boddie brought this proceeding in the chancery court of Coahoma county, seeking the cancellation of certain

Brief for appellant.

conveyances under which the defendants claimed title, as clouds on his title, and for leave to redeem the land from certain tax sales upon which defendants' claim of title was founded. There was also a prayer for general relief. The lands sought to be redeemed were acquired by Boddie in 1873, during his minority, by deed of gift from his grandfather, Malcolm McNeil. His bill was filed within one year after he came of age. He offered therein to pay to the various defendants all such sums as might be necessary to redeem the lands, when ascertained; and assailed the following tax sales as clouds upon his title: 1. A sale to the levee board for district No. 1, in January, 1874, for levee taxes due that board. 2. A sale to the liquidating levee board in May, 1874, for taxes due under the act of 1867. 3. A sale to the state for state and county taxes in June, 1874. 4. A sale to the state for state and county taxes in March, 1875. 5. A sale under the "abatement act," in May, 1875. The opinion contains such other facts as are necessary to an understanding of the case. From a decree for the defendants complainant appealed.

Nugent & McWillie, for appellant.

1. Before considering the soundness of the chancellor's view of the effect of the act of 1888, which seems to have greatly obscured the question arising upon the objections to the copies from the tract books, and caused a confessedly meritorious application to remand the cause to rules to be denied, the admissibility and competency of these copies become proper subjects of inquiry. Why were they insufficient to show title? Section 1784 of the code of 1892 is as follows: "Copies from the books of entries of land kept in any land office in the state, or in the office of the secretary of state, or land commissioner, or other public office, when certified by the officer having charge thereof, shall be admissible in evidence in the same manner and with the same effect as the original certificate of entry." See, also, § 1782. If this does not include the evidence remaining

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on the tract book in the state land office of the issuance of patents, we greatly misinterpret its scope and meaning. Undoubtedly, as appellees urge, a patent is the evidence of title issued out of the state land office, but unless certified copies of the tract book are to have the same effect as those original muniments of title would have, there is nothing for the statute to act upon where it refers to certified copies from the book of entries in the office of the land commissioner. That officer does not, and so far as we can discover, never did, issue certificates of entry, or anything but patents as evidence of a divestiture of title out of the state. It would greatly impair the efficacy of the statute to give it so narrow an interpretation as to exclude entries in the state land office relating to the issuance of patents, which are the instruments whereby the state's title is divested, and limit it to entries in the United States land office, by which alone certificates of entry are issued. *Qui hæret in litera hæret in cortice*. When the intent of the statute is apparent, general words may be restrained and those of narrower import expanded to embrace it, to effectuate that intent. South on Stat. Con., § 218, and cases cited. But if these copies were not admissible, complainant, who relied on them as being admissible, should have been allowed time to produce the patents.

2. What effect did the act of 1888 have on complainant's right to redeem? It is contended that the act in question operated as an absolute bar of the right of redemption, notwithstanding the minority of complainant, and the further fact that the law under which the land was sold secured to him that right.

All the laws under which the lands were sold from time to time preserved to infants the right of redemption for a period after attaining majority longer than the one that elapsed prior to the institution of this suit. The sale to the No. 1 levee board in January, 1874, was governed by the act of 1871, which allowed two years after majority (Acts of 1871, p. 48). The sale to the liquidating levee board was governed by the act

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of 1867, which allowed the same time (Acts 1867, p. 245; Acts 1858, p. 37). The code of 1871 allowed one year (§ 1701).

Appellees rely on section 13 of the act of 1876 as a bar to appellant's proceeding to redeem, but that particular statutory provision has, in a case in all respects similar to the one at bar, been condemned by this court in no uncertain language. *Dingey v. Paxton*, 60 Miss., 1038.

Appellees suggest in their brief that the amendment to the act of 1867 passed in 1873 is silent as to the right of redemption. The right of redemption is there referred to as an existing right, but were this amendatory act wholly confined to other matters and entirely silent as to the right of redemption conferred by the act it amended, the provisions of the original act in that regard would remain unaffected. Acts of 1873, pp. 150 to 155.

We come now to the act of 1888. That act has never been construed as cutting off an infant's right of redemption under the law in force at the time of the sale. Indeed, the subject of redemption is not within its purview. In the case of *Moody v. Hoskins*, 64 Miss., 468, this court denounced as unconstitutional the act of 1876, which repealed § 1701, code of 1871, giving to infants the right of redemption within one year after coming of age, and made all lands held by the state subject to sale absolutely and without reference to such right. This case and that of *Dingey v. Paxton*, *supra*, contain the strongest expression against what is termed the effort to "transfer valuable rights from one to another by the easy process of legislative declaration," and we cite them, relying on the reasoning there employed by the court. If it be argued that, in *Moody v. Hoskins*, the right of redemption was cut off *eo instanti* by the passage of the statute, without leaving any reasonable time for redemption, and the question there determined is therefore different from that arising on the one year limitation coupled with actual occupancy of the act of 1888, construed in *Cameron v. Railway Co.*, 69 Miss., 78, then we have to say that, in the

Brief for appellees.

case last cited; no question of the right of infants to redeem was involved.

Appellees rely on the well-settled rule that no exception in favor of infants and married women will be implied, but must rest upon some express statutory saying. If the original acts under which these lands were sold had contained no exception in favor of infants, we would not pretend that any existed, but when the right has been once given by express statutory provision, we do not think any implication of its repeal arises, or that, under the policy of the law favoring a right of redemption, the act of 1888, which does not expressly mention infants, like that of 1876, or even refer to the subject of redemption, should be applied in bar of their rights.

George Winston, on the same side.

Mayes & Harris, for appellees.

If the court erred in excluding the evidence, the action was harmless to complainant, since the court expressly placed its final decision on the strength of defendant's tax titles. The title of 1874 to the No. 1 levee district was a good title to all the lands. It was conveyed by the thirteenth section of the act of 1876 to the state, and was thence conveyed, by the auditor's deeds of 1888, to defendants. *Shotwell v. Railway Co.*, 69 Miss., 541.

If none of the other titles are good, there is still a third independent title, which applied to all the lands in controversy, and that is the title acquired by sale under the abatement act of 1875. The title so acquired by the state was derived by the defendants through the auditor's deeds of 1888. The deeds of 1888 are *prima facie* evidence of the making of a valid sale, and that the lands were such lands as were subject to be sold under the abatement act. *Patterson v. Durfey*, 68 Miss., 779; *National Bank of the Republic v. Railway Co.*, 72 Miss., 447.

Brief for appellees.

D. A. Scott, on the same side.

We rely upon the provisions of an act of the legislature, approved April 10, 1873 (Laws, p. 150); also, § 1709 of the code of 1871. In neither of these statutes is there any saving clause allowing minors to enforce their remedies after they attain their majority. Infancy is an almost universal statutory exception to statutes of limitations, but is an exception which cannot be implied. 13 Am. & Eng. Enc. L., p. 740; *Ib.*, p. 735. I insist that the act of 1888 controls this case, and is conclusive of it. In *Cameron v. Railway Co.*, 69 Miss., 78, Chief Justice Campbell, in commenting upon section four of said act, held that the limitation therein provided was not unreasonable, and was constitutional, and not subject to adverse criticism. The only proof of the question as to occupation of the land by the appellees, was the deposition of D. G. Pepper, and he states that these appellees had been in actual possession of the lands for more than four years prior to the bringing of this suit, and continuously thereafter. Where more than three years has elapsed after the sale, no suit can be maintained to invalidate the title thereby obtained. *Cole v. Coon*, 70 Miss., 634; *Nevin v. Baily*, 67 Miss., 433; *Gibson v. Berry*, 66 Miss., 515; *Sigman v. Lundy*, 66 Miss., 522. The fact that some of the statutes referred to have been repealed after the lands had been sold for taxes cannot affect the rights of appellees. *Jonas v. Flannagan*, 69 Miss., 577; *Gibson v. Berry*, 66 Miss., 515.

J. W. & W. D. Cutrer, on same side.

The presumptions arising upon the execution of the auditor's deed under the act of 1888, have not been overthrown by the evidence. It was confessed that all the taxes from 1868 to 1874 for state and levee and county purposes had not been paid. Therefore, the sale under the act of 1888, the sale stated and relied on, prevails in the absence of proof to overcome affirmatively the presumption of duly adjudged delinquency

Brief for appellees.

and of prior valid sales. *National Bank of the Republic v. Railway Co.*, 72 Miss., 447.

The sales to the district No. 1 levee board and the liquidating levee board were set forth in the discovery made by appellees, in answer to the demand of appellant's bill, and the correctness of these sales have not been overcome. Again, the act of 1888 presumes such sales to have been properly made, and the presumption has not been rebutted. So that, under the sales to the state and the levee boards, all vested in appellees by various purchases, fortified by the deeds under the act of 1888, the appellees are secure in a perfect title. But it is contended that, notwithstanding this title, appellant still has the right to redeem. It is doubtful if the purpose of the act of 1875, called the abatement act, made any special extension of the right to redeem in favor of minors. In its very terms the act excludes the idea that the right to redeem was reserved to minors until after one year from their attaining their majority.

The lands were sold for taxes in 1874 and 1875, and the law did not allow to minors any period for redemption beyond that provided for and accorded to adults whose lands were sold at the same time. If this be not true, the legislature, in 1876, removed the existence of infancy as a ground for further time to redeem, and accorded infants, after that date, more time to redeem than had been allowed by the laws in force at the time of the sale from which complainant seeks to redeem. The act of 1888 cuts off suits seeking to attack the validity of such sales, except upon evidence of the payment of taxes, and this right also was denied upon twelve months' occupation after the passage of the act. Such legislation is constitutional. *McLemore v. Scales*, 68 Miss., 47; *Patterson v. Dunfey*, 68 *Ib.*, 779; *Cameron v. Railway Co.*, 69 Miss., 78.

Argued orally by *T. A. McWillie*, for the appellant, and by *Edward Mayes*, for the appellees.

Opinion of the court.

COOPER, C. J., delivered the opinion of the court.

Without undertaking to dispose of all the numerous questions in this case, we deal with such as are necessary in its present attitude. The bill has the double aspect of seeking to vacate the several tax titles, and, failing in this, to secure to the complainant the right to redeem the lands from the tax sale, on the ground that he was an infant when the sales were made, and his bill was exhibited within one year after attaining his majority. To maintain his title the complainant offered in evidence a duly certified copy of the entry from "Tract book No. 1 of original entries of swamp lands granted by act of the congress of the United States to the state of Mississippi, September 28, 1850," showing that part of the lands were purchased and paid for by, and patented to, Malcom McNeill, under whom complainant claims, April 30, 1853; and as to another portion of the lands in controversy, the complainant offered in evidence a duly certified copy from the "Tract book of original entries," in the United States land office in the Grenada district of Mississippi, now in the United States land office at Jackson, Miss., showing the entry of said land by those under whom complainant claims title. These muniments of title were excluded by the court, "on the ground that the original patents from the state of Mississippi and the United States to said land should be produced, or their absence accounted for." Upon this ruling by the court, the complainant asked that the case be remanded, so as to enable him to produce the required evidence of title, but the court denied the request, being of "opinion that the complainant is cut off from all right to redeem said land by the act of March 2, 1888, and the bill must be dismissed, although the complainant should show a perfect title but for the tax titles under which the defendants hold." It thus appears that the chancellor denied all relief to the complainant in any aspect of the case.

It was error to exclude the certified copies from the office of the state land commissioner and the United States land office. This

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was not secondary evidence requiring a foundation to be laid for its introduction. It is original evidence, and admissible without any foundation laid. Sec. 1784 of the code makes "copies from the books of entries of land kept in any land office in the state, or in the office of the secretary of state or land commissioner, or other public office, when certified by the officer having charge thereof, admissible in evidence in the same manner and with the same effect as the original certificate of entry," and §§ 1782 and 1783 of the code relate to certificates issued by officers of the United States in pursuance of any act of congress, and make copies of such evidence, and provide that such certificate shall vest the full legal title, etc. The holder of a patent for land may, if he chooses, rely on the certificate of entry or a copy from the books of entry. The obvious purpose of § 1784 is to make copies of the books of entry of land kept in any public office in this state admissible in evidence to prove what they show. The last clause of the section—"in the same manner and with the same effect as the original certificate of entry"—relates to the usual designation of the purchase of land from the state or the United States as an "entry" of the land, and it is observable that the act of March 15, 1852, ch. 16 of the session acts of that year, under which the land in dispute here was disposed of by the State of Mississippi, in sections 17 and 18, speaks of the location of the warrants and the patenting of the land as an "entry" of it. It is true that the secretary of state was to issue a patent, but this was intended as the instrument of evidence in the hands of the owner, and there can be no question of his right to show his entry of the land, whereby he acquired the right to it, and to a patent as evidence of that right, but not the only evidence. The location of the warrants or scrip, and the entries of it on the books by the state officer, gave the party a right to the land and to a patent as conclusive evidence of it, but, as already said, a party is not confined to the patent as the exclusive evidence of the title. So far from the entries on the books in the office from which a

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patent issues being secondary as to a patent, they are primary. They precede it, and it is but evidence of the concurrence of those things which are prerequisites to its issuance.

The opinion of the chancellor to the effect that the complainant was "cut off" from the right to redeem, by "An act to quiet and settle the title to certain lands in the Yazoo delta," etc., approved March 2, 1888 (Acts 1888, p. 40), is erroneous. That act in no manner affects the right of redemption. Its language does not embrace any such right, and it had no such purpose. It relates entirely to title, and in no way affects any right consistent with title. A lien of any kind, a right to redeem, or a claim of any sort not controverting the title but asserted notwithstanding the title intended to be settled and quieted by the act, and in recognition of it, is beyond the scope of the act, and wholly unaffected by it. The right of the infant to redeem is clear, so far as relates to the act referred to.

We decline now to consider seriatim the several rulings of the chancellor upon the exceptions of the complainant to evidence of defendants, and leave those questions open for the consideration of the court below in the further progress of this cause.

Decree reversed and cause remanded.

Syllabus.

JOHN W. TAYLOR v. BOARD OF SUPERVISORS OF CHICKASAW
COUNTY.

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1. STATUTES. *Hutchinson's Mississippi Code. Laws omitted therefrom not repealed.*

The compilation of laws known as "Hutchinson's Mississippi Code" is not a code or revision, and had not the effect of repealing existing statutes of a general and public nature not included therein.

2. COUNTY WARRANTS. *Registration under act of 1842 (Laws, 213). Presentation within one year. Validity dependent thereon.*

The act of February 25, 1842 (Laws, p. 213), providing for the presentation for registration of county warrants within one year from their date, is not a statute of limitation, but the imposition of a condition, the performance of which is essential to their validity.

3. PLEADING. *County warrants judgments. General issue nul tiel record. Limitation upon rule. Code 1871, § 1382.*

Nul tiel record is the only proper plea of the general issue to a demand based upon valid and duly registered county warrants issued prior to the enactment of § 1382, code 1871 (code 1880, § 2160; § 322, code 1892), there being no limitation upon the rule recognizing such warrants as judgments and exempting them from collateral attack prior to the enactment of said section.

4. EVIDENCE. *County warrants. Judicial records. Burden of proof.*

When the petitioner in mandamus to compel payment of certain county warrants, some of which are drawn by order of the board of police, some by order of the circuit court, and some by order of the probate court, has shown regular orders of the board and of said courts, and proved in evidence the warrants regularly issued thereon, or has proved competently the loss or destruction of these records, together with docket memoranda, in part, and shows the regular warrants, or, having so shown the loss and destruction of said records, shows in evidence such warrants regularly issued, without any aiding memoranda docket entries, the burden is on defendant to show that the claims are illegal or fraudulent.

Statement of the case.

5. *SAME. Secondary evidence. Loss and destruction of records. Authenticity of record book.*

Parol evidence is admissible to prove the loss and destruction of the records and files of the circuit court, and as to the authenticity of a minute book, except in so far as it is hearsay or purports to state customs of the officers in discharging their duties where the law prescribes the manner in which they shall discharge them.

FROM the circuit court of the first district of Chickasaw county.

HON. NEWNAN CAYCE, Judge.

Mandamus by appellant to compel defendants, the board of supervisors of Chickasaw county, to levy a tax and provide funds for the payment of certain claims against the county held by petitioner, to wit: one hundred and twelve warrants drawn on the county treasurer by order of the board of police, four by order of the circuit court, two by order of the probate court, and eighty-four jury certificates or warrants issued by the clerk of the circuit court of the county. These warrants, aggregating in amount \$3,958.48, were issued at different times from 1848 to 1853. The petition filed September 24, 1888, alleges that they were duly issued upon the order and judgment of said board and courts respectively; that they had been registered by the clerk of the board of supervisors under the act of March 23, 1886, entitled "An act to authorize the boards of supervisors to ascertain the outstanding indebtedness of the several counties;" that said warrants were unpaid; that the taxes levied for the fiscal year were insufficient to pay the same, etc. The defendants demurred to said petition, and, the demurrer having been sustained and the suit dismissed, the petitioner appealed. The supreme court reversed the judgment, overruled the demurrer, and remanded the cause for further proceedings. The grounds of demurrer, and as well those of reversal, are shown in the report of the decision rendered on that appeal (70 Miss., 87). The opinion delivered in disposing of the present appeal shows the nature of the pleadings after the cause was remanded and also that of the

Brief for appellant.

testimony of the witnesses, Medlin, Martin, Pulliam, Griffin and Baskin, which was excluded over petitioner's objection along with the warrants in support of which it was offered.

Thomas J. Buchanan, Jr., and *W. S. Bates*, for the appellant.

1. The one year limitation of the registry act of February 25, 1842 (*Laws*, p. 213), which defendants pleaded to a large number of the warrants in suit, does not apply to the same. This would seem clear, in view of the fact that the county could not be sued, and there was no law restricting the period within which claim holders should proceed by mandamus to put the taxing power of the county in motion. *Klein v. Supervisors*, 54 Miss., 254; *Taylor v. Chickasaw County*, 70 Miss., 87. Moreover, the act of 1842 was a general one, and was not carried forward into Hutchinson's Mississippi Code (1848), and must be treated as repealed. See §§ 68 and 69 of that code and *M. & O. R. R. Co. v. Weiner*, 49 Miss., 725, 740; *Leighton v. Walker*, 9 N. H., 59; *Wakefield v. Phelps*, 37 N. H., 305; 17 Wis., 196.

2. As to nearly all of the other warrants, the defendants pleaded the general issue, denying that petitioner was the holder and owner of the warrants therein specified. This plea was unaccompanied by notice of anything that defendants proposed to prove under it. If defendants wished to traverse the matter set up in the petition they should have pleaded *nul tiel record*, the claims asserted in the petition being judgments in legal contemplation. *Marx v. Logue*, 71 Miss., 905. See, also, *Tittle v. Bonner*, 53 Miss., 578; *Anderson v. Leland*, 46 *Ib.*, 290.

3. The testimony of Martin, Medlin, Baskin, Griffin and Pulliam, and those warrants to which plaintiffs desired to apply it, should not have been excluded. It shows that the records of both the board of police and circuit courts, by which the orders were made, had been burned, and authenticates a minute book containing a registry of some of them. There was evidence of

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the age of the warrants, and that suit had been brought on them in 1857. They were ancient documents, and proved themselves (65 Ala., 259, 266; 1 Greenl. Ev., sec. 509). They were produced in court by petitioner and shown to have been regularly issued and the absence of the orders allowing them accounted for. They were under seal, and it will be presumed they were issued upon judgments (*Bryant v. Johnson*, 24 Me., 304). The defendant was estopped to deny the validity of the judgments, fifty years having elapsed, all witnesses being dead, and the records lost or destroyed. Counsel discussed in detail the several objections upon which the various warrants were excluded by the court below.

Argued orally by *Thos. J. Buchanan, Jr.*, for the appellant.

WHITFIELD, J., delivered the opinion of the court.

We have examined the voluminous record patiently and carefully, and shall endeavor to lay down the principles which, on a new trial, should finally dispose of this litigation, which has dragged its slow length along from 1857, when the first suit touching these warrants was instituted, to the filing of this mandamus proceeding, in 1888, itself now here on its third appeal.

These different claims date back to 1848, and run through a series of years succeeding. The original suit was instituted on these warrants in 1857. A demurrer was interposed, on the ground that the warrants were already judgments. This demurrer was sustained by the court below, and affirmed by this court in 1868 (opinion book K, p. 61). See *Klein v. Board of Supervisors*, 51 Miss., 878, where the court said: "If the claim has been allowed, the creditor has a judgment, and does not need another, which would be satisfiable with another warrant."

It is said that the war and the death of the original attorney caused the long delay of twenty years, when, in 1888, this pro-

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ceeding for mandamus was filed. The appellee set up, by its second plea, the statute of limitations provided by the act of February 25, 1842. Appellant replied that the act of 1842 was repealed by Hutchinson's Code of 1848, not being brought forward therein. Appellee demurred to this replication, and the demurrer was sustained. What is called "Hutchinson's Mississippi Code" is in no proper sense a code. It is a mere compilation of the statutes at large. The compiler, in his preface, expressly declares that it is not a "revision" nor a "digest." It is true (Hutch. Code, pp. 68, 69) that a committee of three was appointed by the fifth section of the act adopting it, who were to "examine" it and certify whether it did contain "a full and complete compilation of the statute laws of this state" before any "money could be drawn from the treasury on account of said compilation," and that they did so certify, and that the governor "sanctioned" the compilation in pursuance thereof, and the compiler, these preliminary cautionary measures having been complied with, presumably got his money. But the certificate of this committee and the "sanction" of the governor are no equivalent for such provisions as § 3, code 1892, or sections 7 and 8 of Poindexter's Revisal (Hutch. Code, p. 66), the latter of which provided that "all acts and parts of acts of a general and public nature which were not published in" it "were thereby repealed." There is no such provision in "Hutchinson's Compilation," as it should be called, and is called by the legislature which adopted it. Comparing the act of February 25, 1842 (Acts 1842, pp. 213, 214) with the act of February 25, 1846 (Hutch. Code, p. 714), it is clear there is no repeal of the act of February 25, 1842, by necessary implication. But a most significant fact, not referred to by counsel, is that the act of January 28, 1850 (Laws, p. 236), is a distinct legislative recognition of the act of February 25, 1842, as being then in force—an act passed two years after the adoption of Hutchinson's Compilation. That act provides that "all claims against the county of Hinds

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heretofore presented to the county treasurer and entered by him according [to] the provisions of an act prescribing the duty of the county treasurer, approved February 25, 1842, which shall not be presented for payment within one year after the passage of this act, shall no longer be entitled to priority of payment. See, also, Laws 1844, p. 179 (Act February 23, 1844). This is a manifest legislative recognition of the act of February 25, 1842, as then (in 1850) still in force. The legislature cannot, of course, construe or interpret laws, but the act of January 28, 1850, can properly be looked to by this court in determining whether it was the purpose of the legislature to repeal the act of 1842 by the act of 1846 *supra*. *Planters' Bank v. Black et al.*, 11 Smed. & M., 52. The court below correctly held that the act of February 25, 1842, was not repealed. All the claims of appellant, therefore, falling within the condemnation of the bar provided by the said act, were properly rejected, including warrant No. 949.

In response to the suggestion that warrants duly allowed are not to be sued on in the ordinary action; that the county could not be sued till the code of 1857 was adopted, and that there was no statute of limitations barring a proceeding by mandamus, and that, therefore, the act of February 25, 1842, does not apply, it is sufficient to remark that this act is something more than a mere statute of limitations, if, indeed, properly considered, it be, in its essence, a statute of limitations at all. It imposed, as an essential condition of legal validity, on these warrants the requirement of registration, etc., as provided, without compliance with which condition they were not valid claims. This plea interposing the act of February 25, 1842, was interposed to certain specified warrants. As to part of these warrants appellant joined issue in fact, averring that they had been properly presented to the county treasurer and registered, etc., as required by that act. Certain other specified pleas were also interposed to certain other specified warrants. But there then remained a large number of these warrants,

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other than those to which the statute of limitations and said special pleas were set up, as to which the general issue alone was pleaded, without notice of any special matter. This plea denies that the appellant was the legal owner and holder of two hundred and two valid and legally registered warrants, etc. The only proper plea of the general issue in this case was *null tiel record*. *Marx v. Logue*, 71 Miss., 905. If the matters set up in this plea were to be relied on, they should have been specially pleaded. "The allowance of the claim of the auditor by the board of supervisors (or the board of police, their predecessors) was a conclusive ascertainment of the debt, and in that aspect it became of the nature of a judgment." *Supervisors v. Klein*, 51 Miss., 878. And in the same case (*Ib.*, 813) it is said that, up to the code of 1871, § 1382, it was settled that "the entry on the minutes of the board allowing a claim against the county is a judgment in favor of the claimant against the county, which, like any other judgment, cannot be collaterally questioned, and is final and conclusive." Since that section became the law (code 1871, § 1382; code 1880, § 2160; code 1892, § 322) it has been held a limitation on the previous rule in this state that the judgment of the board making an allowance cannot be collaterally impeached. *Howe v. State*, 53 Miss., 57; *Supervisors v. Klein*, 51 Miss., 813. Cases of "palpable illegality and fraud" may always be inquired into. See, also, *Carroll v. Board of Police*, 28 Miss., 38; *Arthur v. Adam*, 49 Miss., 404; *Ross v. Lane*, 3 Smed. & M., 695.

Referring to the difference in the power of the board of supervisors in this matter before and since this § 1382, code 1871, etc., the court says in *Supervisors v. Klein*, 51 Miss., 813: "With unrestricted power on this subject, its judgment was conclusive, but, with a limitation on its power it can act only within the limit, and any excess is void." These claims all arose long prior to this legislation. Code 1871, § 1382, etc.

Applying these principles to the case in hand, we think it is

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clear that the appellee should have pleaded *nul tiel record*, if it meant to plead only the general issue to the warrants as to which there were no special pleas. If it did not deny that there were such judgments as are shown by the orders of the board of police and the circuit and probate courts—did not wish to deny their existence merely, but to show special matter in avoidance of them, as fraud or illegality—such matter should have been specially pleaded. When regular orders of the board of police are shown, and of the circuit court and the probate court, and the warrants proved in evidence regularly issued thereupon, or when the plaintiff proves competently the destruction or loss of these records, together with docket memoranda, in part, and shows the regular warrants, or when the loss or destruction of these records is shown by competent and satisfactory testimony, and these warrants are shown regularly issued, without any aiding memoranda docket entries, the burden is on defendant to show that the claims are illegal or fraudulent.

The testimony offered in this case by Medlin, Martin and Pulliam should have been received in evidence, except in so far forth as it was hearsay or purported to state customs of the officers in discharging their duties, where the manner of such discharge was provided for by law. The testimony was, with these exceptions, under the circumstances of the case, competent, together with the memoranda or docket entries—the best attainable evidence, owing to the long lapse of time, and the proved loss or destruction of the records, in large part.

Warrant 870 should not have been excluded, unless barred by the act of February 25, 1842. Allowance may be to one, and warrant to another. *Honea v. Monroe County*, 63 Miss., 179; *Cotton v. Board of Police*, 27 Miss., 367 (as to jurisdiction of the board), and *Carroll v. Board of Police*, 28 Miss., 38. The objections to 1037 and 1050, to W. F. Baskin, sheriff, on the ground that no law authorized compensation, are not tenable. Laws 1846, p. 76; Laws 1850, p. 237.

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Warrant 1349 should not have been excluded, unless barred. Warrants to J. L. Flanikin (Nos. 1060 and 1102) and William Langham (Nos. 1329, 1330 and 1331), unless barred, should have been received in evidence. Laws 1841, p. 56, sec. 11; Laws 1846, p. 69, sec. 10—construed in *Board of Police v. Morton*, 24 Miss., 240. See, also, Laws 1850, p. 45, sec. 7. So of the warrant to Dr. Ivey (Hutch. Code, p. 296, sec. 2) and of attorney's fees to S. M. Thompson, warrant 1478. *Id.*, p. 712.

The testimony of Martin, Griffin and Baskin as to the loss or destruction of the records and files of the circuit court, and as to the authenticity of minute book No. 1, within the limitations above set out as to the testimony of Pulliam, Martin and Medlin, should have been received in connection with the minute book No. 1. Warrants for allowances to Moffat and Hiller (Nos. 639 and 726 and 997 and 999), should have been received in evidence unless barred. Hutch. Code, p. 438, § 157. Both the minute book No. 1, containing the list of certificates to grand and petit jurors, and the minute or record book covering periods between 1848 and 1850, including the twelfth day of the March term, 1850, and the warrants and petit juror certificates, with the testimony accompanying them, should have been admitted in evidence. For the law governing compensation of petit and grand jurors at that time, see Hutch. Code, p. 882, art. 4, §§ 5, 6; *Ib.*, p. 891, art. 15; Laws 1850, p. 115, §§ 1, 5.

There are thirty-six assignments of error. We deem it unnecessary to go over them seriatim. The principles above laid down are sufficient to control the case and guide the parties to a correct disposition of the case on the new trial.

Reversed and remanded.

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W. H. GRIFFIN ET AL. v. LEOLA BYRD.

1. VENDOR AND VENDEE. *Vendor's lien.*

There exists no vendor's lien in favor of a complainant (as distinguished from a lien reserved by contract) when it appears that the note sued on was the price of the land sought to be subjected and certain personalty in gross, or that the land was sold for one sum and the personalty for another, the latter being evidenced by said note, for in neither case is there a fixed sum due from the vendee to the vendor as the purchase money of the land.

2. APPEAL. *Reversal. Jurisdiction. Dismissal of cause on appeal.*

On the reversal of a final decree in a cause of which the chancery court had no jurisdiction, the appellate court, instead of remanding the cause to the court having jurisdiction thereof, will dismiss the same when it appears from the evidence that the complainant has no cause of action.

FROM the chancery court of Quitman county.

HON. A. H. LONGINO, Chancellor.

The opinion states the case.

F. A. Montgomery, for the appellants.

J. T. Lowe, for the appellee.

WOODS, J., delivered the opinion of the court.

This bill was filed for the enforcement of a vendor's lien for two hundred and fifty dollars on the realty therein described. The bill and complainants' evidence make out a sale of real and personal property for one sum in gross. The answer of the respondent and his evidence show a sale of the realty for one sum, and a sale of the personalty for another—the sum named in the note sued on. In either case, as made out, there was no vendor's lien on the real estate. The rule of law on this subject is that the vendor's lien is only raised where there is "a fixed sum of money due from the vendee to the vendor as pur-

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chase money for the land conveyed." *Peters v. Tunnell*, 43 Minn., 475; Am. & Eng. Enc. L., vol. 28, p. 166, note 2 and cases there cited.

We have found no case contravening this statement, and the cases cited in the note just referred to are not opposed to it, as the usually careful editor of the encyclopedia seems to think. The Virginia and West Virginia cases there referred to were cases in which the sale, it is true, embraced both realty and personalty, and the purchase price was in gross, but the contract of sale and purchase itself created the lien sought to be enforced. In both cases it was a lien made by contract of the parties which was sought to be enforced, and not the vendor's lien, technically so called, which the law gives.

The chancery court has no jurisdiction of the subject-matter, and, reversing not because of want of jurisdiction in that forum, it would be idle to remand the cause to that court. If the appellee had any cause of action, under our singular system of blending equity and common law at the end instead of the beginning of litigation, it would be our duty to send the case to the circuit court, that appellee might there prosecute her claim for recovery upon the \$250 note; but the whole case demonstrates that the appellee has no cause of action. She has received all agreed to be paid by appellant except the sum named in this \$250 note, and there has been a failure of consideration in an amount certainly not less than the sum named in the note. A part of the consideration of the contract was a sale by appellee to appellants of a one-third interest in a decree in chancery for about \$860. The appellee sold his one-third interest, and there was a total failure of consideration as to this one-third interest, for it is indubitably shown that she had no interest whatever in the decree.

It would be vexatious and expensive to remand the cause for a trial which must inevitably result in nothing, and we therefore reverse the decree and dismiss the bill.

Reversed and dismissed.

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B. WEILLE, JR., v. A. G. LEVY & CO.

1. LIMITATIONS OF ACTIONS. *Absence from state. Visits of traveling salesman.*

The visits to this state made in the course of his business by a traveling salesman who has removed to another state, during which he travels from place to place, spending only a day or two in each, cannot be included in the period necessary to bar by limitation a cause of action that accrued prior to his removal from this state, although, during each of said visits, he remained in the state continuously for several months.

FROM the circuit court of Jefferson county.

HON. W. P. CASSEDY, Judge.

The opinion states the case.

E. H. Ratcliff, for the appellant.

The visits of the appellant to this state were not furtive or brief, but open, notorious and long-continued. *Pindell v. Harris*, 57 Miss., 739.

Jeff Truly, for the appellees.

The appellees also rely on *Pindell v. Harris*, 57 Miss., 739, in which the court clearly sets out the scope and meaning of the statute. The appellant was a traveling salesman, without any definite route or fixed appointment, who stopped only a day or two at each place. His occasional visits to the state, under such circumstances, should not be included in the time covered by his plea of the statute of limitations.

COOPER, C. J., delivered the opinion of the court.

The single question presented by this appeal is, whether the appellant was "absent from and resided out of this state" during such part of the time covered by his plea of the statute of

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limitations as will preclude him from the benefit of the statute. The statute pleaded is that of three years. The facts are that less than two years after the right to sue had arisen the defendant removed from this state to Paducah, Ky., where he has since resided, but has pursued the business of a traveling salesman in the states of Mississippi and Louisiana, and, while so engaged, has been, from time to time, in this state. The defendant, testifying, stated that "he was in the state of Mississippi, engaged in such business, in 1892, for a continuous period of six months, but only about a day or two in a place, and in 1893 for a period of four months, and in 1894 for a period of five and one-half months, and in 1895 for one month and eleven days before the bringing of this suit, making in the aggregate a period of more than thirty-nine months in which he was in the state of Mississippi after the plaintiff's cause of action had accrued."

Under these facts, the court below properly held the claim of the plaintiff not barred by the statute of limitations, for the defendant has, at no time subsequent to his removal, been within this state within the reasonable construction of our statute. We can add nothing to the very lucid opinion of Judge Chalmers in the case of *Pindell v. Harris*, 57 Miss., 739, in which the true construction of the words "absent from the state," used in the statute, is given.

In that case the defendant resided in this state four years and six months after the right of action had accrued. She then removed to the state of Tennessee, where she remained about a year and a half, and then returned to this state, where she resided for fifteen months, and then again removed to Tennessee. Subsequently, while confessedly a resident of that state, she visited her mother, with whom she had always resided while in this state, and remained from three to five months. On these facts this court held that the period of the visit to the mother should be computed as a part of the time during which the statute was running, and therefore that the bar was complete. In

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delivering the opinion of the court, Judge Chalmers said that "a furtive, clandestine or transient presence here" would not avail the debtor, for the reason that "such presence would not afford the creditor an opportunity to sue, and would require calculations of time, with a view of determining the whole period spent here, so difficult as to be impracticable."

Counsel for appellant, from this language, argues thus: The court has said that a furtive and clandestine presence in the state will not avail the debtor. Therefore, a presence not furtive or clandestine will avail. The defendant's presence was not furtive or clandestine, wherefore he may compute the time of such presence as a part of the period of limitation.

But this process of reasoning is defective for two reasons—(1) because it rests upon only a part of the opinion of the court, and (2) because it disregards the reason upon which the observations rest. The court not only said that a furtive or clandestine presence would not avail, but also that the presence of the nonresident debtor which would avail, "must not be secret or evanescent;" that "his stay must be continuous, not fitful—an abiding, fixed though temporary in its character." But at last, the substance of the thing required is such a presence in this state as would give to the creditor notice of the fact and a reasonable opportunity to institute his suit. Such was not the character of the defendant's presence on the facts as disclosed by him. He was in the state, it is true, but was engaged in an itinerant vocation. He flitted from place to place, and hovered here and there for a few hours or a day or two, and again took wing. The plaintiff was not required to fire judicial process at him as he flew, but was entitled to a fair and reasonable opportunity for a resting shot, and the judgment is

Affirmed.

Statement of the case.

J. B. HISERODT, ADMR., v. J. B. HAMLETT ET AL.

PAROL TRUST. *Revocable trust. Contingency of death. Interest of beneficiary.*

Where the insured in a life policy payable to himself, his administrators, executors or assigns, transfers the same to a third person as collateral security for a small loan, with directions that, in case anything should happen to him (construed to mean in case of his death) while the loan remained unpaid, such person should collect the policy, and, after deducting the amount of his loan, divide the balance of the proceeds between the wife and child of the insured, a parol trust is created in favor of the wife and child, whereby they acquire an interest *in present*, and, on the death of the insured without revoking the trust, such interest becomes absolute as against his administrator, in a proceeding not involving the rights of creditors of the insured.

FROM the chancery court of Adams county.

HON. CLAUDE PINTARD, Chancellor.

B. C. Smitha died intestate in January, 1895. At the time of his death he was carrying a life policy in the Mutual Life Insurance Company of New York for \$5,000, payable to himself, "his executors, administrators or assigns." By its terms a premium of \$179.50 per year was to be paid for fifteen years. J. B. Hamlett loaned Smitha, in his lifetime, \$179.50 and took as security an assignment of said policy, in writing. After Smitha's death Hamlett collected the face of the policy and repaid himself the amount of the loan.

The appellant, Hiserodt, on his own application as a creditor, was duly appointed administrator of the estate of said B. C. Smitha. In July, 1895, as such administrator, he filed the bill in this case against J. B. Hamlett, Mrs. Rosa Smitha, the widow of B. C. Smitha, and her infant son, seeking to have the assignment to Hamlett declared a collateral security for his loan and to have the remainder of the money collected by Ham-

Brief for appellant.

lett paid over to Hiserodt as administrator, and the trust, if any, declared to be null and void.

Defendants answered admitting nearly all the allegations of the bill, but set up the following reasons why Hamlett refused to pay over the money collected to the administrator: That, on the ninth of August, 1894, Smitha, not having the money with which to pay the premium on the policy, then due, and desiring to keep it in force for the benefit of his wife and child, borrowed the money from Hamlett and executed an assignment of said policy to Hamlett upon a parol trust that, should Smitha die without having repaid Hamlett, he (Hamlett) as assignee of the policy, should collect the \$5,000, repay himself, and divide the remainder between the wife and child; that Smitha died intestate, leaving his wife and child his only heirs, and the insurance money was exempted to them under § 1965 of the code of 1892.

Hamlett testified that, when procuring the loan, Smitha requested that, if anything should happen to him, he should collect the money, pay himself the loan and interest, and pay the balance to Mrs. Smitha for the benefit of herself and child, share and share alike. Hamlett did not claim any interest in the money since the loan was repaid, and stated that had Smitha lived and paid the note, he would have turned the policy over to him. Mrs. Smitha, D. Scudmore and other witnesses testified that they heard Smitha say in his lifetime, at different times, that, in case of his death, his wife and child were provided for, and would get the insurance money. Mrs. Smitha stated that her husband told her, a short time before he died, that he intended to pay Hamlett, get the policy, and have it made out in her name.

From a decree dismissing complainants' bill, he appealed.

E. E. Brown, for appellant.

After Hamlett was paid the amount of his loan, he had no further claim on the balance of the money, and should have

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paid it to appellant as administrator of assured's estate. 13 Am. & Eng. Enc. L., 648, and cases cited; 52 N. W. Rep., 1012; 13 S. W. Rep., 304; 13 S. E. Rep., 241; *Warnock v. Davis*, 104 U. S., 775. The so-called parol trust was simply a request by assured that if anything happened to him, for Hamlett to collect his life insurance policy, pay the note, and turn over the balance to Mrs. Smitha for the benefit of herself and child. Even if competent evidence, this created no trust, and Hamlett expressly states that if assured had paid the note, he would have returned him the policy. For an exposition of what is necessary to create a parol trust, see 1 Thompson on Trials, sec. 1353. If there was a valid assignment, it was void as to assured's existing creditors because it was voluntary. *Catchings v. Manlove*, 39 Miss., 655.

Calhoon & Green, on same side.

The assignment was absolute on its face, hence the legal title to the policy and its proceeds was in Hamlett. But Hamlett admits that he held the policy as security, and that if the loan had been paid by Smitha during his life, under the terms of the hypothecation, he would have reassigned the policy to Smitha. It was the common case of the assignment of a chose in action as collateral security. If this was all when Hamlett's debt was paid, Smitha's estate would have been entitled to the balance, and Hamlett would have been in equity trustee for his estate. But Hamlett contends that Smitha's wife and child are entitled to the balance because of the trust created at the time of the assignment. This language is clearly testamentary so far as the wife and child are concerned. "If anything should happen to him," meant in the event of his death while the assignee held the policy. So long as the assignor and the assignee were alive, the policy was to be held as collateral, and, upon payment of the debt, was to be returned to the assignor. The wife and child were to have no interest in the policy or its proceeds during Smitha's life. In the event of his death

Brief for appellant.

only was any interest or estate to be created in them. Tested by the rules laid down in *Wall v. Wall*, 30 Miss., 96, and *Sartor v. Sartor*, 39 Miss., 771, it is clear that this was a nuncupative will, for the intention was that *in præsenti* no estate should vest in the wife and child. During the life of Smitha no one was to be interested in the policy but Hamlett, as surety, and Smitha. Upon Smitha's death, and only then, a new estate arose in Smitha's wife and child, whereby they were given the proceeds of the policy after the debt to Hamlett was discharged. As such it would be void because not probated, but the proceeds of the policy would be assets for creditors. Hamlett, in undertaking to deal with Smitha's estate, was executor *de son tort*, and is liable to account for the full amount of the assets received by him. The whole funds should be brought into the hands of the administrator, as it is admitted that the estate is insolvent, and there could be a *pro rata* distribution. *Hardy v. Thomas*, 23 Miss., 544; *Gay v. Lemle*, 32 Miss., 309.

The equity of redemption remained in Smitha during his life. At his death this equity of redemption vested in his administrator, and Hiserodt had the equitable title to the surplus proceeds of the policy in Hamlett's hands. As a bar to this title, Hamlett and Mrs. Smitha and child set up that Smitha, at the time the loan was made, directed Hamlett, in the event of his death, while Hamlett still had the legal title to the policy, to distribute the surplus proceeds, share and share alike, between Mrs. Smitha and child. There was no such trust or bequest in the written assignment. The legal title to the policy and its proceeds are vested in Hamlett as mortgagee so far as the assignment is operative during life, but, upon death, after the satisfaction of the mortgage, it is said a new trust is to arise in favor of the wife and child, and this by parol direction in addition to the terms of the writing. We do not contend that a trust cannot be created by parol in chattels or choses in action. We do contend, however, that where such assignment

Brief for appellees.

is sought to be made by will, that the statute of wills requires the same to be done in writing. Where, by a will duly attested, lands were given to A and his heirs "upon trust," without specifying the trust, and then, as by a codicil, a paper was signed specifying the trust, but not duly attested, it was held that the title passed to the heirs at law. *Adlington v. Cann*, 3 Atk., 151.

If a legacy is bequeathed by a will duly executed to A "upon trust," and the testator, by parol, expresses the intention that it shall be held by A in trust for B, such a trust is a testamentary disposition of the equitable interest in the chattel, and therefore void, because the statute of wills requires wills to be written. If it be said that, where a personal chattel is well bequeathed, a trust of it, as excepted from the seventh section of the statute of frauds, may be raised by a mere parol declaration, the answer is that a wide distinction exists between testamentary dispositions and declarations of trust. The former are ambulatory until the death of the testator, but the latter take effect, if at all, at the time of the execution. If the intended disposition be of a testamentary character, and not to take effect in the testator's lifetime, but ambulatory until his death, such disposition is inoperative unless it be declared in writing in strict conformity with the statutory enactments regulating devises and bequests. Perry on Trusts (ed. 1871), sec. 92. If personal property is bequeathed to A in trust, and no trust is specified in the will, no paper not referred to in the will would be competent to prove the trust intended, and the equitable title would descend to the heir. *Id.*, sec. 93. There is no difference in principle between this case and those referred to in Lewin on Trusts, p. 64, sec. 17.

Reed & Brandon and *Martin & Lanneau*, for appellees.

There is no question as to the validity of a parol trust at common law. Trusts at common law may be declared and proved by parol. The statute of frauds has no application in

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such cases. 27 Am. & Eng. Enc. L., p. 54. Parol evidence that an assignment is in trust is admissible. 106 Mass., 322. Valid trusts of chattels may be created and proved and established by parol declarations as well before as after the statute of frauds. 14 Allen, 527; 128 Mass., 161; *Ib.*, 380; 130 *Ib.*, 130. In *Anding v. Davis*, 38 Miss., 574, it is declared that a parol trust in both real and personal estate is valid at common law, though the common law has been altered as to real estate by statute. Section 4230, code 1892, applies only to the creation of trusts in land, and § 4231 applies not to the creation, but merely to the assignment or transfer, of a trust previously created in land.

Mayer & Harris, on same side.

No specific form of words was necessary in order to create a trust in favor of the wife and child, in the hands of the creditor who took the assignment originally. And such an assignment is not void because of the operation of the statute of frauds. *Alexander v. Berry*, 54 Miss., 422; *Murphy v. Reed*, 64 Miss., 614; Hill on Trustees, marginal page 57.

Argued orally by *Marcellus Green*, for the appellant, and by *Edward Mayer*, for the appellees.

WHITFIELD, J., delivered the opinion of the court.

The bill is filed by appellant in his character as administrator alone. No just construction can make of it anything else. If, therefore, it were proper to file a bill in that capacity, and, also, at the same time, in his capacity as creditor seeking to set aside the parol trust as fraudulent against creditors, he has not here done so, and we must treat it as a bill by the administrator alone. Nor does it make any difference, in this view, that the bill avers the insolvency of his intestate. *Blake v. Blake*, 53 Miss., 182, is decisive in this view. We are satisfied, after the most careful consideration, that the fair result of the testi-

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mony, taken as a whole, is that Smitha created a valid parol trust by what he said and did at the time of the delivery to Hamlett of the policy; and, if so, the fact that he reserved the power of revoking the trust thus once perfectly created and constituted, upon a contingency to happen in his lifetime, would not defeat the trust if he did not in fact revoke it, the contingency not happening in his lifetime. We must not allow ourselves to be confused by the fact that the event upon the happening of which the interest was to be enjoyed, the trust was to be executed, was death. It is as competent for one to make the event in the future upon the happening of which the estate is to come into possession, and the trust is to be executed, the death of the donor, as any other event. The fact, in such case, that the event named is death, rather than some other selected event, is not at all determinative of the quality or legal character of the trust. It is a mere time when the trust, completely and perfectly constituted theretofore, is, as to the estate already thus vested in interest by it in the trustee, for the beneficiaries, to come into possession—to be enjoyed. Here Smitha, at the time of the delivery of the policy to Hamlett, directed him, in case anything happened—in case, as otherwise put, of his death—to divide the surplus over his debt, secured by the assignment—a wholly separate matter—share and share alike, between his wife and child. The phrase, “in case of his death,” did not have the legal effect of preventing the trust from taking effect *in presenti*, to be enjoyed *in futuro*. The trust was then perfectly constituted. The estate in interest in the surplus then, in his lifetime—at the time of such creation—vested *in presenti* in the trustee, Hamlett, for the beneficiaries. Hamlett was by it then clothed by the law, applied to the transaction thus consummated, with the duties and responsibilities of a trustee, and the beneficiaries with the right to the estate, subject to Smitha's right of revocation, if exercised according to the terms of the trust as declared. There is no testamentary feature here.

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“No testament is of any force while the testator liveth.” It is ambulatory wholly. It vests no present interest, absolute or conditional, subject to revocation or not. It is waste paper till death vitalizes it, whereas a revocable trust is vital till revoked. A completely constituted parol trust of personalty is not ambulatory at all, as to the present vesting of interest—subject to revocation, or not so subject. It is vitalized by what is done then, at the time of its constitution by the donor, and is as effectual thenceforward, even when subject to revocation, until duly revoked, as any other disposition of property, and to be administered according to the legal character stamped upon it at the time of its creation. One may do what he will, within legal limits, with his own. He may declare a trust absolute, never thereafter having, in anywise, the right to interfere with it, or he may declare a trust revocable upon a named contingency.

In the former case the beneficiaries take absolutely; in the other, upon the condition that the revocation does not follow upon the happening of the contingency. If no such revocation follows, their rights are perfect. But, in the latter case, as completely as in the former, the estate or interest vests *in presenti* in the one case, never to be defeated; in the other, subject to defeasance in the manner indicated in the trust.

In our own state, the case of *Wall v. Wall*, 30 Miss., 91, perfectly establishes this distinction. There the instrument was retained by the grantor in his custody until his death, and he stated that the acknowledgment and delivery of the instrument and placing it among his (the grantor's) papers, was intended by him as a delivery of said paper at his death, and it was earnestly contended that it was a testamentary disposition, and void. But the court said: “The determination of the legal character of instruments of this kind depends mainly upon the question whether the maker intended to convey any estate or interest to vest before his death, and upon the execution of the paper, or . . . whether all interest and

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estate whatever were to take effect only after his death. . . . But its character [the character of the instrument there] must be determined upon a consideration of all its parts, comparing one part with another, in order to ascertain the purpose which the party had in view, and the mode by which he intended to accomplish it." Just as here, the whole evidence (not isolated fragments of it) must be looked to, comparing part with part. The court concludes: "Upon the whole, we consider that this deed conveyed the present right to the property, to be enjoyed in possession at the donor's death, and subject to his power to annul it in the way limited in the deed. This was a substantial right in the donees, which excluded the general power of alienation by the donor, and of revocation in any other mode than that prescribed in the deed. And in this consists the difference between such conveyance and a will; that, by the former, a present interest vests, which will take place in possession *in futuro*, unless defeated in the mode, and according to the terms, specified in the conveyance; and, in the latter, no right, estate or interest whatever vests until the death of the testator. In the one case the conveyance takes effect *in præsenti*, to a certain extent; in the other, it has no effect whatever until the death of the testator." And the correctness of this distinction is abundantly sustained, with great clearness of reasoning, in many authorities. Out of many we refer specially to the masterly opinion of Finch, J. (one of the ablest judges gracing the bench in this country), in *Van Cott v. Prentice*, 104 N. Y., 45; *Lines v. Lines*, 142 Pa. St., 149, s.c. 24 Am. St. Rep., 487; *Dickerson's appeal*, 2 Am. St. Rep., 547, and *Stone v. Hackett*, 12 Gray (Mass.), 227 (opinion by Bigelow, J.), all directly in point. See, also, the numerous authorities cited in 27 Am. & Eng. Enc. L. (1st ed.), 310 *et seq.*

The first cited case is a very striking one, and upholds a trust on far less conclusive evidence than supports the trust at

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bar. That case was this: "P, by an instrument termed by him therein 'his deed of trust,' transferred to plaintiff certain securities and funds, in trust, to invest and collect the income thereon during the life of P, to pay over the income to K, to be by him appropriated for the use of four beneficiaries named, and, at the death of P, the principal to be disposed of in accordance with instructions contained in a writing sealed up and delivered with the instrument, with directions that it should not be opened until such death. A full power of revocation was reserved, and it was provided, as a condition of the grant, that the beneficiaries should have no legal or equitable right to the principal or income; that the trustee should hold, subject to the grantor's direction and control, until his death. It was also declared that if any attempt should be made to interfere with the execution of the trust, or to claim the securities contrary to the conditions of the instrument, the trust should at once cease and determine. In an action to recover possession of the securities, which had come into the hands of defendants (the executors of the will of P), it was held that a valid trust was fully and completely constituted, and, as the same was not revoked by the settler during his life, the trustee was entitled to the possession of the trust property; that it was immaterial that the grant was voluntary and without consideration [no creditor's rights being there involved, as none are here involved on the present record]; that the declaration that the beneficiaries should have no legal or equitable right was not intended as a denial of an equitable right to enforce the trust as against the trustee, while the settlement remained unrevoked, but only as a denial of any right as against the settler; also, that the validity of the title of the trustee was not affected by the fact that he held subject to the control and direction of P; that, while the trust continued and existed only at the will of the settler, it was good and effectual until revoked"—the court significantly observing: "We ought not to put the creator of this trust in the attitude of deliberately nullifying his own evident purpose. That he

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meant to create an effective trust is beyond all question, and a construction which makes him destroy in the very effort to create, should not prevail if there be any other rational interpretation. . . . The trustee is directed to hold the fund and invest and reinvest and pay over as ordered, but is to do all this subject to the settler's absolute control. This cannot mean that the trustee is to have no title, and the trust no effective existence, and the property remain the settler's, but that the trust and the title, good and effectual while it stands, is, nevertheless, to continue and exist only at the will and pleasure of the settler. Its continued existence was to be absolutely subject to the direction and control of Prentice—a result always inevitable when a power of revocation is reserved. We discover nothing in the provisions of the deed, properly construed, inconsistent with a completely constituted trust, wholly voluntary and benevolent, and subject to revocation by the settler at any moment; a kind of trust of which the books furnish many instances, and which, indeed, are sometimes subject to doubt and suspicion, if the power of revocation is absent."

In *Lines v. Lines*, *supra*, the court say: "The power of revocation reserved in the deed, having never been exercised, was precisely as if it had never existed. If the right is not exercised during the lifetime of the donor, and according to the terms in which it is reserved, the validity of the trust remains unaffected, as though there had never been a reserved right of revocation." Says Bigelow, J., in *Stone v. Hackett*, *supra*: "A power of revocation is perfectly consistent with the creation of a valid trust. It does not, in any degree, affect the legal title to the property. That passes to the donee, and remains vested for the purposes of the trust, notwithstanding the existence of the right to revoke it." See, also, 1 Perry, Trust, § 104, bottom of page 103. In Dickerson's appeal, *supra*, the grantor was also himself the trustee.

It is insisted that Hamlett's statement, on cross-examination, that, had Smitha paid him, he would have delivered the policy

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back to Smitha, is fatal to this view. But whether the trust was completely constituted by what Smitha said or did at the time of the delivery of the policy to Hamlett, is not to be determined by any mistaken notion of Hamlett as to whether it was so constituted a trust, but by the legal character, as a trust or not, which the law stamped on the transaction, when and as it occurred. And, if it were true that the power of revocation was to be exercised by demanding from Hamlett and receiving back the policy—if that were to be the precise mode of the exercise of the power of revocation—the complete answer is that the power to revoke was, in fact, never so exercised. We do not deal here with the rights of creditors. We only add that *Coates v. Worthy*, 72 Miss., 575, did not decide that the proceeds of the policy in that case would have been exempt as against a debt contracted prior to the act of April 1, 1892, the assured being insolvent. The argument pressed upon us in that case, which went off on a demurrer to the bill, was that § 1552 of code of 1892 made the proceeds there liable, there being no widow or child. We say thus much, however, as to this case, simply to prevent misconception, as to *Coates v. Worthy*, *supra*, and not as indicating any view as to what we would hold on that feature in this case, on its peculiar facts, even were a proper bill filed. The present decree is correct, and is

Affirmed.

Brief for appellant.

J. K. GLENN v. W. H. CALDWELL ET AL.

UNLAWFUL DETAINER. *Purchaser at execution sale. Tenant of defendant in execution. Purchaser an assign. Code 1892, § 4461.*

Under § 4461, code 1892, a purchaser of land at execution sale may maintain the action of unlawful detainer against a tenant of the defendant in execution, who "withholds possession after the expiration of his right," the purchaser having become, by the act of the law, the "assign of him who is so deprived of possession, or from whom possession is so withheld."

FROM the circuit court of the second district of Panola county.
HON. EUGENE JOHNSON, Judge.

Unlawful detainer by appellant against appellees, tenants in possession of one Lee Caldwell. The land in suit was sold under an execution in favor of appellant against said Caldwell, appellant becoming the purchaser on August 7, 1893. The sheriff did not execute a deed thereto until February 14, 1894. The unlawful detainer suit was instituted on November 14, 1894, less than a year subsequent to the execution of the deed, but more than one year subsequent to appellant's purchase at the sale. The land was incumbered with a deed of trust for a large amount at the time of the sale. The case, by consent, was tried by the court without a jury. Judgment for defendants, and appeal by plaintiff.

Stone & Lowry, for the appellant.

There can be no doubt about the right of a purchaser at execution sale to maintain an action of unlawful detainer against the defendant or those claiming under him as tenants. In *Cummings v. Kilpatrick*, 23 Miss., 106, the right is clearly implied and recognized. Our statute is much broader now than it was then. Code 1892, § 4461. In *Ragan v. Harrell*, 52

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Miss., 818, the argument and holding of the court is as applicable to a purchaser at execution sale as to one at a trustee's sale, who, the court held, could maintain this form of action. In the case at bar there is clearly privity between the parties, and it has been expressly held, on that ground, under a statute no broader than ours, that the purchaser at execution sale is entitled to the remedy. *Liss v. Wilcozen*, 2 Col., 85. In several other states his right to maintain the action has been expressly affirmed. *Pensoneau v. Heinrich*, 54 Ill., 271; *Johnson v. Baker* (Ill.), 87 Am. Dec., 296; *Dortch v. Robinson*, 31 Ark., 296; *People v. McAdam*, 84 N. Y., 287. The states which hold the contrary have statutes requiring that plaintiff must have once been in possession, as in Missouri and Alabama.

L. F. Rainwater, for the appellees.

1. A purchaser at execution sale cannot maintain unlawful detainer, but must sue in ejectment. He does not belong to any of the classes to which that remedy is extended by § 4461, code 1892. The action is possessory, and does not involve title, and there must be "an expiration of the right by contract to hold possession." *Lobdell v. Mason*, 71 Miss., 937.

It is held that a purchaser at trustee's sale may avail of the remedy, but on the ground that the grantor's right of possession, as against the trustee, had expired. This was an expiration of right by contract to hold possession, and was within the statute. *Marks v. Howard*, 70 Miss., 445; the concluding part of *Cummings v. Kilpatrick*, 23 Miss., 106.

2. While the sheriff's deed was delivered to plaintiff within one year anterior to the institution of suit, plaintiff's purchase at the sale was more than one year prior thereto, and his right to the action was barred under the statute.

COOPER, C. J., delivered the opinion of the court.

The single question presented by this appeal is whether a purchaser of land at execution sale may maintain the action of

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unlawful entry and detainer against the tenants of the defendant in execution. The court below was of opinion that he could not, and, on motion, dismissed the action.

We think he may. The statute, code of 1892, § 4461, provides that "anyone deprived of the possession of land by force, intimidation, fraud, stratagem, stealth, and any landlord, vendor, vendee, mortgagee, or trustee, or *cestui que trust*, or other person against whom the possession of land is withheld, by his tenant, vendee, vendor, mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withholds possession after the expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy herein prescribed."

The only inquiry involved is whether the purchaser at execution sale is an assign of the defendant in execution within the meaning of the statute. It is of easy solution, and, we think, free from doubt. Both the spirit of the statute and its letter embrace such purchaser. At the common law, forcible entry was an offense, and punishable as such. Our statute enlarges the remedy by conferring upon the person whose possession is unlawfully invaded a summary action for the recovery of possession, and this right is given not only to the original owner, but to his legal representative or assigns. Another class of persons, other than those who enter by force, fraud, etc., are subjected to the action—namely, those whose entry is lawful under a contract, express or implied, but who remain in possession after expiration of their right to hold; and, as against these, the right is given also to the original owner, his legal representative or assigns. The statute views with equal disfavor him who enters by force, fraud, stratagem, intima-

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tion or stealth, and him who, entering lawfully under contract, refuses to redeliver possession according to that contract.

As against any person of the enumerated classes, we can perceive no reason why the language of the statute should receive a narrow and restricted construction. Indeed, there is little room for construction; the words are plain and unambiguous. The word assigns "comprehends all those who take immediately or remotely from or under an assignor, whether by conveyance, devise, descent, or act of law." Anderson's Law Dictionary, title Assign; *Baily v. DeCrespigny*, L. R., 4 Q. B., 186; *Brown v. Association*, 34 Minn., 547.

There is nothing in the context which limits the meaning of the word assigns to those who take under an assignment by contract as distinguished from those who take under an assignment by operation of law, for the right is given to the legal representatives and assigns, and legal representatives clearly mean those who take by operation of law. But little light is afforded by reference to authorities from other states. The right is a statutory one, and decisions construing statutes different from ours can serve but little purpose in considering our statute.

The question is whether our statute gives the right. If the legislature had designed that the remedy should be limited to assigns by contract, it would have been a simple matter to have said so, but, instead of this, through three codes they have retained the word assigns, and this, in its legal significance, includes as well assigns by operation of law as those by contract.

Judgment reversed and cause remanded.

WHITFIELD, J., dissenting.

The statute of limitations did not begin to run until the sheriff's deed was made. In this we all concur. It is clearly settled by the following authorities: *Endicott v. Penny*, 14 Smed. & M., at p. 157; *Leach v. Koenig*, 55 Mo., at p. 453; *Young v. Withers*, 8 Dana (Ky.), at pp. 167, 168; *Johnson v. Baker*,

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87 Am. Dec., at p. 296; *Strain v. Murphy*, 49 Mo., at p. 340; *People v. Mayhew*, 26 Cal., at pp. 659, 660; and *Anthony v. Wessel*, 9 Lee (Cal.), 103. But from the judgment of the court, holding that, under our statute (code 1892, § 4461), unlawful detainer can be maintained against the tenant of the defendant in execution, I dissent. The scheme of the statute is this: To provide a remedy for the recovery of the possession of land, where there has been either such a deprivation of possession, or withholding of possession, as is described in the statute. There are two evils to be remedied—"such deprivation and withholding of possession." The persons who may maintain the action to recover the possession of land wrongfully withheld are characterized as "any landlord, vendor, vendee, mortgagee, or trustee, or *cestui que* trust or other person against whom the possession of land is withheld by his tenant, vendee, vendor, mortgagee, grantor or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him . . . from whom possession is so withheld." These persons all clearly fall within the category of those between whom a contract right to hold had subsisted. "Other person," of course, means other person *ejusdem generis* with those described—some "other person" between whom and another a contract right to hold possession had subsisted.

The legislature was intending, in this class, to name all persons between whom and others there had existed a contract right to hold possession, and, after enumerating many, for fear of omitting some, used the expression "other person" in the sense indicated. It is said, however, that the word "assigns" means assigns by operation of law as well as by contract. Doubtless the word, in the abstract, as defined in the dictionaries, legal or literary (Anderson or Webster), is comprehensive enough, in a secondary sense, to embrace both, but the primary meaning given by Webster is, "One appointed by another to enjoy some right or privilege or property." But,

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with all deference, the legal significance of a word used in a statute is not to be found always, and sometimes not primarily, by ascertaining only what the word means in a dictionary. "The meaning of such words are best arrived at, in this connection, by a comparison of our statutes on this subject-matter and a reference to our decisions thereon. The context in which words stand, the subject-matter in the discussion of which they are used, are the primary tests." *Harris v. State*, 72 Miss., 964. It is a familiar rule of construction that the meaning of terms may be expanded or restricted by reference to the subject-matter. Endlich on the Interpretation of Statutes, sec. 518. The books abound with illustrations of this rule—as, in *Duncan v. Walker*, 2 Dall., 205, where the context and subject-matter required the words "legal representatives" to mean heirs or alienees. And, indeed, in this very statute, a striking illustration of this very rule is furnished, for, manifestly, "legal representatives" here mean heirs, as in *Card v. Card*, 39 N. Y., 323.

What, then, has been the course of legislation and decision in this state on this subject? At the common law there was no such civil remedy as forcible entry or unlawful detainer. These were offenses criminally punishable. Statutory law in this country advanced a step by giving the remedy at all. Our initial statute was that of June 18, 1822 (Hutch. Code, p. 813), and this practically remained unchanged up to and in the code of 1857 (page 349). Construing this statute in *Burford v. Nolan*, 30 Miss., 428, it was held that the purchaser at a trustee's sale could not maintain the action against the grantor in the deed in trust even, because it was said the defendant must have entered into possession under the plaintiff, and must continue so to hold possession in violation of the contract of the parties. Another step forward was needed, and it was taken in the legislation represented by § 1582 of the code of 1871, which expressly provides that the action may be maintained by the trustee or *cestui que trust* and his legal representatives or

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assigns. And so *Ragan v. Harrell*, 52 Miss., 818, and *Marks v. Howard*, 70 Miss., 445, held, on this statute, that the purchaser at such trustee's sale could maintain the action against the grantor, on the ground that the grantee's right to hold by contract (evidenced by the deed in trust) expired upon his default—expired as he had, by the deed, contracted it might expire—and he was therefore clearly holding over after the expiration of his right by contract to hold, and it may be said after the expiration of his right by contract with the purchaser at trustee's sale, for he agreed, by the trust deed, that, on default, the trustee shall sell and convey to the purchaser. Such sale, and the consequent rights of the purchaser, arise, by agreement, out of the contract contained in the trust deed. The judicial sale is *in invitum*. It may be said in this connection that in Alabama (*Womack v. Powers*, 50 Ala., 5), Massachusetts (*Woodside v. Ridgeway*, 126 Mass., 293), and Missouri (*Hatfield v. Wallace*, 7 Mo., 112), the same rule was announced, on similar though not identical statutes, that had been announced in *Burford v. Nolan*, *supra*.

In 1878 (Laws, p. 172) another attempt was made to broaden the remedy, the third clause of section 1 of that act providing that "anyone entitled to the possession of any lands or tenements," etc., held "against the consent of the party so entitled after the expiration of his right so to hold against the consent of the party so entitled," etc., might maintain the action; and this act was relied on in *Wolfe v. Angevine*, 57 Miss., 767. But the code of 1880, § 2645, identical with our present statute (§ 4461, code 1892), struck out this enlarging language of said clause 3, and again narrowed the remedy to its old scope, clearly put by Chalmers, J., in *McCorkle v. Yarrell*, 55 Miss., at page 577, where it is said that the action "lies only in the cases pointed out by statute, embracing cases only where [on this point] land is wrongfully withheld after the expiration of a term springing out of, or dependent upon, a contract, express or implied, between the parties or their privies."

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Such, then, has been the course of legislation, and partially of decision. But it is said that in *Cummings v. Kilpatrick*, 23 Miss., at page 122, it is held that the action can be maintained against the tenant of the defendant in the execution, and there is a dictum to that effect. But both the cases cited in support of that dictum (*Haynes v. Adams*, 3 A. K. Marsh., at page 1037, and *Brubaker v. Poage*, 1 T. B. Mon., at page 125) were cases where there was a written agreement whereby the party in possession was constituted (thus by contract) the tenant of the plaintiff in the action, and afterwards held over after the expiration of his right so to hold under such contract—cases which do not touch the proposition under discussion.

Rabe v. Fyler, 10 Smed. & M., 441, is also relied on—a case often, from inattention to its facts, grossly misconceived. In that case Rabe had been in possession as tenant of the Agricultural Bank. The bank executed a trust deed to Fyler, one of the trusts being that, as trustee, he was to collect the rents of the land. Fyler at once saw Rabe, and explained the situation to him, and notified him that he must pay the rent to him (Fyler) thereafter. Rabe made no objection. On this state of case the court below gave this charge: “If the jury believe from the evidence that Rabe was the tenant of the bank, and the bank assigned the premises to Fyler, with authority to collect the rent, and Fyler gave Rabe notice of this assignment and authority, and he made no objection, the jury have a right to find that Rabe was tenant of Fyler.” And that only was the precise point decided. And this is the exact construction put on this case in *Cummings v. Kilpatrick*, *supra*. It is also urged that the action could be maintained in *Pensoneau v. Heinrich*, 54 Ill., 271, but, at page 272, the court say the reason is that “the act of 1861 declared that the action might be maintained in all cases of the sale of lands under a judgment or decree of a court of this state.” And see Rev. St. Ill. 1881, ch. 57. And so, also, *Dortch v. Robinson*, 31 Ark., at page 300, shows that the action is maintainable there, by ex-

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press statute, and that, but for the statute (page 299), it would not be. And *Liss v. Wilcoxsen*, 2 Col., 88, so holds, because of express statutory provision. Gen. St. Col., §§ 1489, 1490. And these cases cited from other states, thus resting upon express statutory provisions alone, are, so far from supporting the contention of appellant, strongly against him, since it was only because of the statutes that the action could be in those states maintained, and we have no such statute. The logical deduction is that, therefore, it cannot be maintained here.

But it must be further noted that, under these decisions, the action was held maintainable not only against the tenant of the defendant in execution, where the lease is posterior to the judgment lien, but also against the defendant in execution himself. Now, not only does *Cummings v. Kilpatrick*, 23 Miss., 122, hold that it was not there maintainable against the defendant in execution, but my brethren perfectly agree with me that it is not, under § 4461 of the code of 1892, so maintainable against the defendant in execution. "Now, herein is a marvelous thing"—that the court holds that the action cannot be maintained against the defendant in execution, and yet that it may be against his tenant! That is, a larger measure of right is given against one who remotely holds under the defendant in execution than against the defendant directly. This is a palpable incongruity. Now, says Endlich (Interp. St., sec. 264): "The presumption against absurdity in the provisions of a legislative enactment is probably a more powerful guide to its construction than even the presumption against unreason, inconvenience or injustice." And, again (sec. 258): "General terms [as 'assigns'] should be so limited in their application as not to lead to . . . an absurd consequence." Now, when we look to see against whom the action may be brought, we find that it may be brought "against him who so withholds possession after the expiration of his right and all persons claiming to hold under him." "So withholds after the expiration of his

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right" clearly means "after the expiration of his right by contract." And the only ground, under the statute, upon which the action is maintainable against a party in possession, other than the one who made the contract, is that such person in possession claims under the person who made the contract. Again, when it was desired to give the purchaser at tax sale the right to maintain the action, it was necessary to enact a statute (sec. 4461a); and, while it is true that such purchaser gets the foundation or paramount title, yet, is he not also an assign in the sense in which the court holds the purchaser at execution sale is? And, if so, what need was there for section 4461a? See, also, § 4250, code 1892.

It would seem, therefore, that this action, from time to time enlarged in its remedy by legislation, has yet always been judiciously held strictly within the precise limits expressly marked out for it by the statute. And there are many wise reasons why it should be so interpreted. It involves no question of title, and was not designed to supersede ejectment, but to provide a more speedy remedy, although its efficacy as a summary proceeding has been greatly impaired by the statute allowing to the defendant a suspensive appeal. *Spears v. McKay*, Walk. (Miss.), 265; *Loring v. Willis*, 4 How. (Miss.), 383; code 1892, § 4475.

Once more: If a purchaser at execution sale at law is an "assign," within the meaning of this statute, so must also be the purchaser, under a sale under a decree in equity, of land. And yet such last purchaser would obviously resort to his writ of assistance. If it had been the purpose of the legislature to make the defendant in execution, or his tenant after the judgment lien attached, subject to the action, nothing was easier or simpler than to have done so, and yet, through not three codes only, but throughout all the legislation of the state on the subject, no such provision has been placed in the statute. And it is well settled that the presumptions are against the "intent to

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alter the existing law beyond the immediate scope and object of the enactment under construction." End. Interp. St., secs. 113, 127.

For all these reasons, and others it would be too tedious to elaborate, it is to me clear that the word "assigns," in this statute, should, in view of our legislation and decisions, and the nature of the action, be held to mean only "assigns by contract," and not by operation of law.

ELIZA MOORE v. ROBERT MOORE ET AL.

1. RESULTING TRUST. *Payment of purchase money. Time of payment.*

The rule that a resulting trust in land can only arise in favor of a third person paying the purchase money, when it is paid "at the time of the purchase," means that the payment must be made at or before the time of the conveyance whereby the vendee acquires title.

2. SAME. *Case.*

Where one enters into a contract for the purchase of land, paying a part of the price, and giving his notes for the remainder, the payment of which is a condition precedent to the conveyance of the land, and his wife, upon a subsequent agreement that she shall be substituted as vendee, pays the notes, but the vendor, in ignorance of this arrangement, conveys the land to the husband, who fully recognized his wife's right to the land and often promised to correct the mistake, but died soon afterwards without having done so, a trust results in favor of the wife, and she is entitled to the land as against the husband's heirs at law, the payment by the wife, under the agreement stated, having been prior to the conveyance by the vendor.

Brief for appellees.

FROM the chancery court of Claiborne county.

HON. CLAUDE PINTARD, Chancellor.

The opinion states the case.

Brame & Alexander and J. McC. Martin, for the appellant.

Where one enters into an executory agreement for the purchase of land, and afterwards, before the title is conveyed to him, uses the money of another to make payment, a trust results in favor of such other. *Murry v. Sell*, 23 W. Va., 475; *Mosteller v. Mosteller*, 40 Kan., 658; *Brown v. Cuve*, 23 S. C., 251, 257; *Gilchrist v. Brown*, 165 Pa., 275; *Rogers v. Murry*, 3 Paige Ch., 389, 397.

It is not claimed by the appellant that a trust arises in favor of one who advances money, as a loan, to the party taking the title, or to pay off a lien or improve the property after he has acquired title. But it is insisted that one does arise where the money of another is paid for the land before the title becomes vested in the purchaser. The case of *McCarroll v. Alexander*, 48 Miss., 128, relied on by opposing counsel, is not in point, the money having been advanced in that case to take up an outstanding obligation after the legal title had been conveyed. The same may be said of *Brooks v. Shelton*, 54 Miss., 353, which simply recognizes the general principle that the money must have been paid "at the time of the purchase." While there is some uncertainty in the language of the decisions in the several states where the question has been passed upon, it may be said that, beginning with *Botsford v. Burr*, 2 Johns. Ch., 406, it has been very generally held that, in order to establish a resulting trust, the money must have been paid at or before the purchase was completed.

E. S. & J. T. Drake, for the appellees.

A resulting trust does not arise unless the money of the third person was paid as his, and as a part of the original transaction; or, if paid subsequently to the purchase, the funds were

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applied under an agreement made at the time of the purchase. 10 Am. & Eng. Enc. L., 8; *Brooks v. Shelton*, 54 Miss., 353; *McCarroll v. Alexander*, 48 *Ib.*, 128. See, also, *Mahorner v. Harrison*, 13 Smed. & M., 53; *Bowman v. O'Reilly*, 31 Miss., 261; *Gee v. Gee*, 32 *Ib.*, 190; *Gibson v. Foote*, 40 *Ib.*, 788; *Hitt v. Applewhite* (MS. Op.).

WHITFIELD, J., delivered the opinion of the court.

Appellant, who is the widow of Henderson Moore, exhibited this bill against the appellees, who are the children and grandchildren of Moore, seeking to establish a resulting trust in the tract of land described. The case made by the proof is this: Moore owned one tract of land, and his wife another. On February 11, 1882, he made an executory contract for the purchase of this land from Julius Weiss, paying him at that time \$100, and executing his two notes, each for \$107.50, payable, respectively, December 1, 1882, and December 1, 1883; the purchase price being \$300, and the \$15 excess in the two notes representing interest, and, at that date (February 11, 1882), received from Simon E. Marx (Julius Weiss' agent) a written paper acknowledging receipt of the \$100 and the two notes aforesaid, and stating the terms of the executory contract of sale. Moore and his wife were negroes, living in Claiborne county, Miss., and Julius Weiss was a resident of New Orleans, La. After the payment of the \$100, Moore was stricken with rheumatism, and determined to forfeit the \$100 and entirely abandon his contract of purchase. His wife, the appellant, was then, by agreement between them, substituted in his place as the purchaser of the land, and she was to pay the two notes, and a deed to the whole tract was to be made to her. Weiss was not informed of this change as to the purchaser. The wife did pay the two notes, but Weiss made the deed to Henderson, and mailed it to him, the deed being executed June 3, 1884. Moore, upon receipt of the deed, and afterwards, fully

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recognized the wife's right to the land, and declared that his wife had paid for the land, that he had intended to have the deed made to her, but by mistake it had been made to him, and that he was going to have it "fixed next week," and (on his deathbed) that he wanted it "changed to her." He died before he could have the deed made to his wife.

It will be observed that the rights of third parties are not here involved. The paper of February 11, 1882, was not a deed. It was a mere receipt and executory contract for the sale of the land. Weiss himself says that it was a receipt for cash and two notes for purchase of the land, but no deed was to be made till the notes were paid. It must be noted that it was intended by both Henderson and his wife that the deed should be made to her to the whole of the land, and its not being so made was not due to any secret violation of fiduciary duty by Henderson—not due, in any sense, to fraud. Had it been, there would have been a case of constructive, not resulting, trust. 2 Pom. Eq. Jur., sec. 1031, note 3; Beach, Mod. Eq. Jur., § 215. It was due wholly to mistake, the parties living in different states.

The very able counsel for appellees insist that the payments by the wife were made after the purchase, and hence that no resulting trust arose, and quote 10 Am. & Eng. Enc. L., as follows: "In order to establish a resulting trust, it is necessary that the party paying the purchase money should have actually paid it, as his own, as a part of the original transaction." Counsel overlooked the last part of the sentence quoted, "at or before the time of the conveyance." The question is, what is meant, when it is sometimes loosely said that the consideration must be paid at or before the time of the purchase, by the phrase "the time of the purchase?"

We think the authorities clearly show that, in the case of an executory contract of purchase, where part is paid, and there are deferred installments of consideration to be met, that "the time of purchase" means, within the rule we are discussing,

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the time of the execution of the conveyance passing the legal title. Mr. Beach thus lays down the rule (1 Beach, Mod. Eq. Jur., § 223): "A resulting trust must arise at the time of the execution of the conveyance. A subsequent payment will not, by relation, attach a trust to the original purchase. The trust, to exist, must be coeval with the deeds; and after one person has made a purchase with his own money or credit, no subsequent transaction, whether of payment or reimbursement, can produce such a trust in his favor. It is frequently said that, in order to create a resulting trust, a payment of the purchase money must be made at the time of the purchase; but by this it is only meant that the trust must arise from the original transaction, and at the time it takes place, and at no other time, and that it cannot be mingled or confounded with any subsequent dealings; that it is impossible to raise a resulting trust so as to divest the legal estate of the grantee or his heirs by the subsequent application of the funds of a third person to the satisfaction of the unpaid purchase money." Citing, in note 5, *Milner v. Freeman*, 40 Ark., 62.

The same doctrine precisely is laid down by Pomeroy. 2 Pom. Eq. Jur., sec. 1037; *Mosteller v. Mosteller*, 40 Kan., 658; *Murry v. Sell*, 23 W. Va., 475 (where the court say that while "a resulting trust cannot be raised by matter *ex post facto*," nevertheless, "until the purchase money is paid, and the conveyance executed, the contract is merely executory, and the vendor, in law, is still the owner of the lands," and this was a case where A first made an executory contract for the purchase of land, and, afterwards, before the purchase money was paid or the conveyance was executed, he agreed with B that, if he would enter into the purchase, and pay half, he should have half the land, and B complied, and the title was taken in A's name); *Gilchrist v. Brown*, 165 Pa. St., 275; *Rogers v. Murray*, 3 Paige's Chy., p. 397 (where the court say: "After the legal title has once passed to the grantee by the deed, it is impossible to raise a

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resulting trust so as to divest the legal estate, by the subsequent application of the funds of a third person, to the improvement of the property or to satisfy the unpaid purchase money. The resulting trust must arise, if at all, at the time of the execution of the conveyance"), and *Brown v. Cave*, 23 S. C., 251, in which case, at page 257, the court say: "When must the purchase be considered as having been made, when the minds of the parties first met in verbal agreement, or at the time the titles were executed? We take it that, in reference to the rule in question, we must consider the purchase made when it was consummated by conveyance. . . . We suppose that a payment made before the execution of the deed would, in the sense of the rule, be a payment at the time of the purchase."

A careful analysis of our decisions upon this subject, attention being had to the facts of the cases, will show that they are in perfect harmony with this rule. Indeed, in *Alexander v. McCarroll*, 48 Miss., at page 136, the rule is announced in these very terms. Say the court: "If a trust results at all, it must be at the time when the conveyance is made." But there Mrs. Alexander's \$1,000 were used to pay the last of four annual installments, long after the "conveyance" had been executed to the husband, February 12, 1847; and in *Harvey v. Ledbetter*, 48 Miss., page 95, where the trust was established, the purchase money was paid, and the conveyance then made, at the time of the sale by the administrator *de bonis non*. And in *Brooks v. Shelton*, 54 Miss., 353, on this particular point, it clearly appeared that, "in every instance, the real estate was bought, wholly or partially, on a credit, the notes of the husband having been given, and subsequently liquidated with the wife's means," and that the conveyances were all made when the sales occurred, and long before the liquidation of said notes.

In *Mahorner v. Harrison*, 13 Smed. & M., 53, it clearly appeared (see pages 64, 65) that "the southeast quarter of section 33," the land as to which the trust was not established,

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was purchased by Harrison with his own money, and the deed made to him, and, if Hooe ever "refunded the money, as a specific payment for that piece of land," it was after the conveyance; and the authorities cited, *Botsford v. Burr*, 2 Johns. Ch., 405, and *Rogers v. Murray*, 3 Paige, 390, the last already quoted from, announce the rule as we state it.

In *Bowman v. O'Reilly*, 31 Miss., 261, it was sought to establish a resulting trust in favor of the heirs of Philip O'Reilly, on the ground that his brother, Nicholas O'Reilly, had bought the land with Philip's money. The court held that it was not shown that the money "was paid by the individual means of Philip O'Reilly," and that, if it had been, it would have presented the "case merely of a purchaser who had used the means of another in purchasing lands for himself, which, though it would have rendered him a general debtor for the money used, would have created no lien upon the property purchased in favor of the person whose money had been used"—a case clearly, on the hypothesis stated, of a loan, not of one where the beneficial ownership of the land was, or was intended to have been, but in the person whose money was used. And in this case, also, it is clearly shown that the sale was on a credit to Nicholas O'Reilly, and the deed executed at the time of the sale.

In *Gee v. Gee*, 32 Miss., 190, it is expressly shown (page 191) that the father, the complainant, became surety for his son, A. L. Gee, on the note for the purchase money, but that the father never paid the money, as such surety, till some time after the conveyance, which was executed at the time of the sale to A. L. Gee. *Gibson v. Foote*, 40 Miss., 788, like the recent case of *Appleshite v. Hitt*, MS. op., was plainly stated to be the case of a loan. The husband "borrowed" the money of the wife, and purchased the land for himself. The court say: "The agreement to pay interest clearly shows that it was contemplated he should use the money on his own account." It thus manifestly appears that in all these cases

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cited by the learned counsel for the appellees, the facts showed either a loan, or that the consideration was paid after the conveyance, where the trust was disallowed, or, when it was allowed, that the consideration was paid before the conveyance, in pursuance of the intention arising out of the transaction, that the party who thus furnished the money so paid before the conveyance, was to be the beneficial owner, in whole or in part, of the land; and that in *Alexander v. McCarroll*, *supra*, the court expressly declared the rule in the terms in which we have announced it.

In the case of *Blodgett v. Hildreth*, 103 Mass., 484, part of the consideration was paid before and several installments of it after the conveyance was executed, and that court (one of the ablest in the Union) held that the payment after the conveyance did not defeat the trust, the court saying (page 487): "It need not be money paid or advanced at the time of the conveyance. The mode, time and form in which the consideration was rendered are immaterial, provided they were in pursuance of the contract of purchase. It is sufficient if that which in fact formed the consideration of the deed moved from the party for whom the trust is claimed to exist, or was furnished in her behalf or upon her credit." We do not cite this case to approve it, but simply to show that a court of the highest ability has pushed the rule far beyond the necessities of this case.

But it may be well to note another striking phase of this case, differentiating it wholly from any of our decisions, but analogizing it strongly to the case of *Murry v. Sell*, *supra*, and that is this: That here, indisputably, the "transaction" which is the "original" one, as to the arising of this resulting trust on the facts of this record, was the transaction wherein Henderson Moore abandoned his "interest of purchase," and whereby his wife became the purchaser. Henderson gave up his contract—abandoned it—and had no further interest in the matter. Had matters remained thus, his payment would clearly have gone for nothing. Then, his contract of purchase having

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been thus wholly abandoned, the wife became the intending purchaser of the whole beneficial interest in the land, by her agreement to pay the purchase money and take the title to the whole land, which payment, in pursuance of such agreement, she made. Clearly, she is entitled to the whole land.

Reversed, and decree here.

T. J. MIXON ET AL. v. L. H. CLEVINGER.

1. TAX TITLES. *Ambiguous description. Pleading. Code 1880, § 491.*

Where the complainant, in a bill for the cancellation of a tax title, avers his ownership of a tract of land by a valid description and identifies it as the delinquent land assessed by an ambiguous description, and so sold and conveyed for taxes, and purchased by the defendant, the description in the assessment roll and tax deed is, by these averments, so applied to the particular tract as to call for no response in defendant's answer or the adduction of parol evidence, under § 491, code 1880, to apply the same thereto; and this effect of said averments is not obviated by complainants' use of the words "pretended sale" in referring to the sale for taxes.

2. SAME. *Assessment. Approval of roll. Order that roll be "received as corrected."*

When the minutes of the board of supervisors show that an assessment roll had been already received and taken up for examination and correction, a subsequent order entered thereon that the roll be "received as corrected," necessarily means that the board thereby finally approved the corrected roll. *Mills v. Scott*, 62 Miss., 525; *Grayson v. Richardson*, 65 *Ib.*, 222, cited.

3. SAME. *Officer participating in sale grantee in tax deed. Interest acquired after sale.*

That a deputy of the tax collector, after the land had been bid off by a purchaser at a tax sale, acquired an interest therein by contract with such purchaser before the money was paid, the tax deed being made to them jointly, does not invalidate the sale, by reason of the assumed incapacity of the deputy to buy at a tax sale in the making of which he participated.

74	67
79	778

74	67
90	344

Brief for appellants.

4. SAME. *Tax collector's deed. Prima facie validity of sale. Code 1880, § 526.*

The testimony of a tax collector that he did not see how he could have sold a tract of land at tax sale in the smallest legal subdivisions, as required by law, unless he had a map of it, and that he did not remember that he had a map, is insufficient to overcome the effect of his deed, under § 526, code 1880, as "*prima facie* evidence that the assessment and sale of the land were legal and valid."

5. SAME. *Irregularities attending sale. Testimony of the tax collector inadmissible.*

The testimony of a tax collector that he failed to offer a tract of land sold by him for taxes in the smallest legal subdivisions, as required by law, is inadmissible, as going to impeach his own official conduct.

FROM the chancery court of the second district of Perry county.

HON. W. T. HOUSTON, Chancellor.

The opinion states the case.

N. C. Hill and Brame & Alexander, for appellants.

1. The description in the tax deed and in the assessment roll is wholly free from any ambiguity. The field notes of the United States survey, as appears from the records thereof in the land commissioner's office, show that Bowie river is a monument in said survey. It is noted on the survey as traversing section 32, township 5; range 1 west, in Perry county, from north to south. This court takes judicial notice of the government surveys. *Muse v. Richards*, 70 Miss., 581. The pleadings made the description certain, and no proof was necessary. The cases relied on by appellee do not meet this case. The case of *Sims v. Warren*, 68 Miss., 447, was that of a patent ambiguity, and the roll furnished no clue to aid it. The bill in this case admits that the land assessed and sold for taxes by said description, was the land claimed by appellant as being east of Bowie river. The case of *Dingey v. Paxton*, 60 Miss., 1038, was the case of a patent ambiguity, with nothing on the roll to aid

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it. Even that description, under the act of 1878, would be good. The same may be said of *Cogburn v. Hunt*, 54 Miss., 675, and *Morgan v. Schwartz*, 66 Miss., 613. The more liberal rule prevailing since the act of 1878 and the code of 1880, and under the present law, may be seen in *Herring v. Moses*, 71 Miss., 620; *Lochte v. Austin*, 69 Miss., 271; *Reber v. Dowling*, 65 Miss., 259. In *Kyle v. Rhodes*, 71 Miss., 487, we find a description sustained where land was described by reference to well-known designations by which the boundaries can be made certain.

2. *Mixon* did not buy. *McCoy* bid in the land at the sale, and it was by a subsequent arrangement that the deed was executed to both. There was nothing objectionable in this. There is no law prohibiting a deputy to buy. The whole doctrine is discussed in *Blackwell on Tax Titles*, secs. 400-405. It is fully discussed in 25 Am. & Eng. Enc. L., 713. See, especially, *Hare v. Cornell*, 39 Ark., 196; *O'Reilly v. Holt*, 4 Woods, 645. The principle applicable is not different from that applied in *Brown v. Carlisle*, 62 Miss., 595.

3. It sufficiently appears that the roll was approved. Approval will be presumed. *Grayson v. Richardson*, 65 Miss., 222; *Morgan v. Blewitt*, 72 Miss., 903. There is no competent evidence as to what the roll shows. It is manifest beyond doubt that the word received was intended to mean approved. *Mills v. Scott*, 62 Miss., 525; *Grayson v. Richardson*, *supra*. By the laws of 1892 (Laws, p. 28), all assessments of lands for 1889 and 1890 were validated, and this cures the defect, if there was such.

Watkins & Travis, for appellee.

The decree of the lower court is correct.

1. The land in dispute was not described in the assessment roll on which the alleged sale was based. It is so ambiguous as to amount to nothing. *Sims v. Warren*, 68 Miss., 447; *Dingey v. Paxton*, 60 Miss., 1038; *Cogburn v. Hunt*, 54 Miss.,

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675; *Morgan v. Schwartz*, 66 Miss., 613; *Pearce v. Perkins*, 70 Miss., 276.

2. Appellants admit in their answer that they do not rely on the sale made by the tax collector, but on an agreement and sale subsequently made, when Mixon became a party to the transaction. The title is, for this reason, void. 13 Smed. & M., 330; 22 Am. & Eng. Enc. L., 689.

3. One of the alleged purchasers was a deputy sheriff at the time of the sale. So far as we have been able to ascertain, this court has never passed upon the particular point, but the principle seems to be well established elsewhere, and by implication here, that a deputy cannot purchase at his principal's sale. See *McLeod v. Burkhalter*, 57 Miss., 65. The case of *Flournoy v. Smith*, 3 H., 62, also holds this by implication. See, also, 22 Am. & Eng. Enc. L., 597.

4. The assessment roll under which the sale was made was never approved by the board of supervisors, as appears from the evidence. "Received as corrected" is no approval, directly or by implication. *Davis v. Vanarsdale*, 59 Miss., 367; code 1880, § 500.

5. From the evidence, the land must have been offered in a body, and not in the smallest legal subdivisions, as required by § 521, code 1880.

COOPER, C. J., delivered the opinion of the court.

The appellee exhibited his bill in the chancery court of Perry county to cancel, as a cloud upon his title, a hostile tax title, claimed by the appellants, and, on final hearing, the court decreed in his favor. The lands are a part of the east half of section 32, township 5 north, range 13 west. They were assessed for the year 1890, under the following description: "East half west of Bowie, section 32, township 5 north, range 13 west," and were so described in the conveyance from the tax collector to appellants.

The assessment roll, on which the lands were sold, was prop-

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erly returned by the assessor, and went into the custody of the board of supervisors. At the August meeting of the board, an order was made as follows: "Ordered, that the real assessment of 1889 be now taken up for examination and correction." At the same meeting, and subsequent to the above order, the following order was made: "Ordered, that the real assessment for 1889 of this county be received as corrected."

T. J. Mixon, one of the appellants, was deputy sheriff to McCallum, the sheriff and tax collector, and on the day of the tax sale acted as clerk to the collector, noting down the lands as sold by him with the names of the purchasers. The land of the appellee was bid in at the tax sale by the appellant, McCoy. Afterwards, and before the deed was made by the tax collector, an agreement was entered into between Mixon and McCoy, by which Mixon was to pay one-half of the amount bid, and was to have one-half interest in the land, and the collector thereupon, being requested by the parties, made the conveyance to Mixon and McCoy.

The grounds upon which the tax deed is assailed are (1) because of ambiguity in the description of the land on the assessment roll and in the deed; (2) that the assessment roll was never approved by the board of supervisors; (3) that the deputy of the tax collector was a purchaser at the tax sale; and (4) that the whole tract was sold without having first been exposed to sale in the smallest legal subdivision, as required by statute.

By § 491 of the code of 1880, it was, among other things, provided that "parol testimony shall always be admissible to apply a description of land on the assessment roll or in a conveyance for taxes, where such testimony will show what land was assessed and sold, and there is enough in the description on the roll or conveyance to be applied to a particular tract of land by the aid of such testimony." Conceding, for the purposes of this decision, without deciding, that there is an ambiguity in the description of the land, we think it clear that it has been fully explained and the land definitely and certainly

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identified. No parol proof was taken by the defendants, but none was needed, for the facts alleged by the complainant, in his bill in reference to the land, removed all doubt, if any existed. The complainant alleged that he was "the legal and equitable owner of the following lands, situated in the second judicial district of Perry county and State of Mississippi, to wit: That part of the east half of section 32, situated south and west of a certain stream known as Bowie river, in township 5 north, and range 13 west, of said county and state." Having disclaimed his title to the land, complainant further averred "that, for the fiscal year 1890, the said lands in question was, by H. M. McCallum, the tax collector and sheriff of the said Perry county, pretended to be sold for the taxes due thereon for said year, and deeded to T. J. Mixon and L. S. McCoy, said defendants, in March, 1891, for taxes as aforesaid, for the insignificant sum of 9 and $\frac{1}{100}$ dollars, as more fully appears from a certified copy of said pretended conveyance filed herewith, marked 'Exhibit G,' and prayed to be made and considered a part of this bill of complaint."

If there was any ambiguity in the description of the land, it sprang from the single fact of a failure to designate "Bowie" as a river. If the description had been of so much of the east half of the section as is west of Bowie river, it would have been a perfect one. We judicially know that there is a Bowie river in that section of the state in which the lands lie. The complainant avers, in effect, that this river intersects the east half of section 32, that his lands lie west of the river, that they were delinquent for the taxes of the year 1890, that they were sold by the tax collector for such taxes, bought by the appellants, and that the very deed sought to be canceled was executed by the collector for the purpose of conveying these lands to them. It is true the complainant says the lands were pretended to be sold, but this word pretended is but the usual form of characterizing an act the validity of which the complainant challenges by his bill. It does not suggest that the

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lands he claims were not the precise lands with reference to which action was had. On the contrary, the complainant insists that his lands were those as to which the proceedings were directed.

If there was ambiguity in the description of the land, and the complainant, as he might have done, had averred only that the defendants asserted some claim to the land which ought to be canceled, as a cloud upon his title, it would then have devolved upon the defendants to have offered parol proof "to apply the description of the land on the assessment roll and in the conveyance" to the land claimed by the complainant. If such had been the state of the pleadings and the defendants in their answer had set up the facts which complainant has stated in his bill, and proved them as alleged, no doubt could exist as to what lands were assessed and sold. It is axiomatic that a defendant may treat as true all facts averred by the complainant. He need not restate the facts in the answer, for so to do would make no issue between himself and complainant, and, in the nature of things, no evidence can be required to establish a fact charged by one of the parties and admitted by the other. Nothing would be added to the force of the argument that such evidence should be required, if it were conceded that the complainant was under the necessity of making the averments found in the bill in reference to the assessment and sale of the lands. It would yet remain true that the averments identified the land, applied the description in the assessment and tax deed to it, and left no issuable fact as to which evidence could be adduced.

2. The entry of the order by the board of supervisors that the real assessment roll for the year 1889 be received as corrected, sufficiently shows an approval of the roll by the board. The word "received," as here used, cannot have its primary significance, for the former order of the board shows that the roll had already passed into its custody, that it had accepted it from the assessor and taken it up for examination, as required

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by law. It had corrected the roll, as the last order shows. There was no one from whom it could then receive the roll, for it was already in the custody of the board, and, necessarily, the meaning of the word, under these circumstances, was that the board finally had accepted with approval, or approved, the completed, corrected roll. *Mills v. Scott*, 62 Miss., 525; *Grayson v. Richardson*, 65 Miss., 222.

3. The evidence does not support the proposition that the deputy of the tax collector was a purchaser at the tax sale. We do not mean to decide or imply that if such were the fact, the sale would thereby be invalidated. The facts are that the land had been exposed to sale and bid off by McCoy, and nothing remained to be done except the payment of the bid and the execution of the deed, when Mixon acquired an interest in the land. This interest he acquired not by virtue of the tax sale, but by private agreement with McCoy, and the tax collector's conveyance served but to execute that agreement. If McCoy had received the deed from the collector, and had instantly conveyed an undivided one-half interest in the land to Mixon, no one could doubt the right of the parties. While it is true that one may not do indirectly that which the law forbids him to do directly, there is nothing to prevent a man from doing directly that which the law permits him to do indirectly.

4. Section 526 of the code of 1880 provides: "The conveyance made by the tax collector to individual purchasers of land, and the list of lands sold to the state, as aforesaid, shall be *prima facie* evidence that the assessment and sale of the land were legal and valid." No evidence was introduced to show that the lands were not exposed to sale in the manner prescribed by statute, except the testimony of the tax collector by whom the sale was made.

The chancellor sustained the exception of the defendants to the answers of this witness to the fourth, fifth and sixth interrogatories. The exceptions do not appear in the record. We suppose, however, they were grounded upon the incompetency

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of the officer as a witness to testify so as to impeach his own official conduct, but if the testimony had been admitted, it was wholly insufficient to overthrow the *prima facie* case made by the deed. The officer does not state how he sold the land, or that it was sold in violation of law. He simply says that, in his opinion, he does not see how he could have sold the land in the smallest legal subdivision unless he had had a map of it, and does not remember that he had a map.

Decree reversed and bill dismissed.

WHITFIELD, J., dissenting.

A tax deed, the description in which is void at the common law, might be upheld, under the statute, if there be "enough in the description to be applied," by parol testimony, "to a particular tract of land." There must, in such case—the case of a tax deed in which the description was void at common law—be furnished by the deed or assessment roll some clue which, when followed by the aid of parol testimony, will conduct certainly to, and identify, the land. Code 1880, § 491 (code 1892, § 3776); *Dodds v. Marr*, 63 Miss., 443. Such is the statute, and such has been its plain construction. I agree, therefore, that, if parol testimony had been offered to identify the land, it should have been received, and the land, doubtless, could thus have been identified. Without such testimony (none of which was offered), the tax deed is clearly void for uncertainty in the description. We have not before us, therefore, a case where parol proof was offered, but simply and merely a case where the tax purchaser stands squarely upon the description in his deed. The tract of land is conceded in the record to embrace but 280 acres, not 320. It is not, therefore, the whole of the east half of section 32. As the case must stand, then, upon the description in the deed, and upon that alone, what is that description? It is this: "E. $\frac{1}{2}$ west of Bowie, sec. 32, T. 5 N., R. 13 W." This is the exact description in the tax deed and on the assessment roll. This de-

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scription means, clearly and indisputably, not the whole of the east half, but that part of the east half which is west of Bowie. Now, looking to the deed alone, which 280 of the 320 acres constituting the east half does the deed or roll mean? Again, that part of the east half of section 32 west of Bowie. Bowie what? Bowie river? Bowie town? Bowie farm? It fits one, as well as another. Is it possible that any court could fail to hold that this is an ambiguity, which, unaided by parol testimony, renders this deed void? It is said that we take judicial knowledge that there is such a river in the state as Bowie river. Undoubtedly. That is not the point. I presume it is too plain for argument that we do not take judicial knowledge that the word "Bowie," occurring in a tax collector's deed, means "Bowie river." And yet the whole opinion in chief is built upon the assumption that "Bowie" means "Bowie river," though there is no such word as river in the deed or on the roll, and there is no parol testimony that applies to the clue—"Bowie"—and shows that it meant "Bowie river." Judicial knowledge that there is such a river in the state as Bowie river, is a totally different proposition from the one that, when we find the mere word "Bowie" in a deed, we judicially know that means "Bowie river." It is impossible to state a more palpable misconception. Standing on the description alone, the deed is manifestly void for uncertainty in the description.

The court feels the stress of this argument, and tells us that "the ambiguity has been fully explained and the land certainly and definitely identified." How? In the mode pointed out by the statute—parol testimony? Not at all. How, then? By the description which the complainant gives of his own land! It is the usual description, seen in every bill filed to cancel a cloud upon title, contained, I doubt not, in every such bill ever before this court. The complainant is required by statute (§ 501, code 1892) to deraign his title. He must file as exhibits the deeds containing the description of the land he owns. If he did not, he would be demurred out of court. And yet,

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say the court, if he complies with the law and describes his land, no matter how void the description in the tax deed may be, the court will seize on the good description he has used in making the usual averment of ownership, and write it in the tax deed, and thereby make the tax deed description perfect. This method of saving the tax deed certainly possesses the merit of simplicity, but does not commend itself to my mind as sound. A tax collector need not trouble about description—he need not put in any description at all.

But, doubting whether this was altogether sound, my brethren insist that the bill avers that “his [complainant’s] lands were sold by the tax collector for such taxes, and bought by the appellants,” and say this, too, after just quoting one of the allegations of the bill—that the lands were “pretended to be sold and deeded” by the tax collector. I deny that there is anywhere in this bill any averment that these lands were sold and deeded by the tax collector. I quote now literally the averments of this bill: “Your complainant further shows . . . that, for the fiscal year 1890, the said land in question was, by the tax collector, pretended to be sold . . . and deeded,” etc., as fully appears from a certified copy of said pretended conveyance, filed as Exhibit B, and made a part of this bill.

In paragraph 13 the conveyance is again called a “pretended conveyance,” and the tax purchase a “pretended purchase.” So, again, in paragraph 15, and everywhere throughout this bill, from first to last, over and over again, it is charged that the tax collector did not sell these lands, but “pretended” to sell them; did not make a valid tax deed, but “pretended” to make one. And in paragraph 16 the pleader says: “That said pretended instrument of conveyance in question is void for uncertainty; that the land in question is not described therein; . . . and the said instrument is void and of no effect.” I submit that the pleader averred at the outset, as the law required him to do, his ownership, and, of

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course, properly described his land. Turning, then (having deraigned his title, which, of course, also showed a perfect description), to the cloud which he sought to cancel—the tax collector's deed—he distinctly and positively, over and over, avers that the said tax sale was pretended and void, and the deed pretended and void. And yet, the court say he averred that the tax collector sold the land—that is, validly sold it—and conveyed it; and appellants bought. In other words, the court holds that, when a pleader avers a sale to be pretended, he means that it is real; and when he avers that the tax collector made a pretended conveyance, he means that he made a valid one; and when he avers that the tax deed was void for uncertainty in the description, he means that it contained a good description! Reduced to its last analysis, that, and that only, is the holding of the court. The court takes not the whole bill, and its plain, natural, and inescapable meaning, but, looking to the description at the outset, shuts out all else, and fearlessly jumps clear of all else, to a construction at war with the whole purpose of the bill. I had never supposed before that the “axiomatic” proposition that what is averred in the bill, and admitted in the answer, need not be proved, was meant to teach us that the averments of a bill are to be wrenched outright from their plain and necessary meaning and effect, and made, by some artificially magical process, to mean just the opposite. It is curious, too, that no such view was dreamed of below, and that, on the contrary, the defendant, understanding these averments of the bill to mean just what they plainly say, vigorously denies that the sale was pretended, or the conveyance pretended, or the description in the tax deed in need of aid of any kind. The court, feeling, apparently, some qualm still about the certainty of its footing, faintly concedes that “if there was ambiguity in the description of the land, and the complainant, as he might have done, had averred only that the defendants asserted some claim to the land which ought to be canceled as a cloud upon his title, it would then have devolved

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upon the defendants to have offered parol proof to apply the description of the land on the assessment roll and in the conveyance to the land claimed by the complainant."

Now, I earnestly submit that the paragraphs of the bill already quoted show indisputably that the effect of the averments—the plain and unmistakable effect—is just that which the court say would have been sufficient to put the tax purchaser to parol proof. But that is not all. Here is a paragraph of the bill that certainly leaves no doubt: "That in order that the title to said land in question be freed of said pretended charge, and that your complainant's title be complete, undisputed and unclouded as before said pretended sale," etc., "and complainant's title to same now remains subject to said pretended charge, and is obscured by clouds and suspicion cast on it by said pretended claim of defendants," etc. Here, then, is the very averment, in substance and essence, which the court say would be sufficient to put the tax purchaser to parol proof!

I submit that to work out from the averments of this bill, filed to cancel this pretended tax title as a cloud, the result the court has reached, is to utterly wrench all these allegations from their natural and necessary meaning, and to do violence to the plainest canons of construction. The complainant is defeated, in short, because the court say he has furnished in the averment of his bill, as to description, a substitute for the parol proof which would have applied the word "Bowie." But what description? The description which the statute says may be aided by parol proof is the description in the tax deed.

Now, manifestly, the only ground upon which the conclusion of the court can rest is, that the parol proof is not needed, because the averment in the bill is an averment that the land complainant owns is the land described in the tax deed. But the averment is the direct opposite of this, to wit: that the tax deed does not describe the lands he owns. It is not at all true that because the complainant describes his land properly, and says the tax collector "pretended" to sell "said lands," and

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“pretended to convey” “said lands,” by the tax deed, he means to aver, or does, in legal effect, aver, or that it is a fact, that the lands described in the tax deed are identical with the lands of the owner. *Non constat* but that, in fact, he did sell, and did attempt to describe in the tax deed, other lands than the complainant’s.

The difficulty of maintaining the view of the court becomes most striking when we take the case of the bill filed to cancel a tax deed on the sole ground of the voidness of the description of the land in it. Desirous, as I earnestly am, of concurring with my brethren, I cannot conscientiously do so when the difference in opinion amounts to conviction, and, as it does so in this case, I must dissent from the judgment of the court.

WESTERN UNION TELEGRAPH COMPANY v. MISSISSIPPI RAILROAD COMMISSION.

1. TELEGRAPH COMPANY. *State police regulations.*

A telegraph company, engaged in domestic as well as interstate business, is subject to such reasonable police regulations as the state may impose.

2. SAME. *Chartered by another state. Lines erected by authority of congress.*

In such case it is immaterial that the company was chartered by another state and secured its right to erect its lines along the post roads in this state under an act of congress.

3. RAILROAD COMMISSION. *An administrative agency. Findings not conclusive. § 4284, code 1892.*

The findings of the railroad commission are, under § 4284, code 1892, not final and conclusive. Although in some respects it exercises *quasi* judicial power, the commission is an administrative agency, and its conclusions are subject to judicial inquiry.

Statement of the case.

FROM the circuit court of Jefferson county.

HON. WM. P. CASSEDY, Judge.

This suit was instituted by the Mississippi Railroad Commission against the Western Union Telegraph Company for the penalty provided by § 4329, code 1892, for a failure to comply with § 4328 of said code. The code sections read thus:

“4328. *Telegraph and express companies to maintain necessary offices, etc.*—Every telegraph and express company shall establish and maintain offices for the transaction of business with the public, in their respective capacities as common carriers, at each city, town and village convenient to its routes, if, in the opinion of the railroad commission, the public convenience and necessities require it; and they shall not discontinue an office, once established, without the consent of the commission, which has authority to require such companies to establish and maintain offices, and to require telegraph companies to keep night operators at every place where, in its judgment, the business and public convenience justify and require it.

“4329. *Penalty on carriers for violating the law.*—If any railroad or other common carrier shall violate any of the provisions of this chapter, or shall fail to do and perform any duty imposed by law, or shall fail to comply with any lawful order of the commission, or to conform to any of its reasonable rules and regulations, or shall demand or receive a greater sum for the transportation and handling of any passenger or freight than authorized by law or the commission, it shall be liable to a penalty of five hundred dollars for every such failure or overcharge not otherwise punished, to be recovered by action in the name of the commission in any county where such failure may occur or overcharge be made; but in trials of cases brought for a violation of any tariff or charges as fixed by the commission, it may be shown in defense that such tariff, so fixed, was unreasonable and unjust to the carrier.”

The constitution of the state provides: “Section 195. Ex-

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press, telegraph, telephone, and sleeping car companies are declared common carriers in their respective lines of business, and subject to liability as such."

Acting under these provisions of law, the plaintiff began its suit, and charged in its declaration that the telegraph company, having previously established an office at Fayette, in Jefferson county, applied to the commission for permission to abandon the office, which request the commission refused, because, in its opinion, public convenience and necessity required the maintenance of the office; that after this refusal of consent, the telegraph company, without authority, abandoned the office.

The defendant's second plea set up that it was a New York corporation, that it was not doing business in Mississippi by reason of any grant, right, privilege, franchise, or immunity obtained from this state; that it obtained its right to erect its lines along the post roads of the state under an act of congress, and that the office at Fayette was on such a road, and was established before the creation of the railroad commission, and before the enactment of the law under which the suit was brought, and that the company was engaged in interstate commerce. To this plea a demurrer was interposed, and it was sustained.

The defendant's third and fourth pleas set up the matters averred in the second plea, and, in addition, that the receipts and business at the Fayette office were insufficient to pay the expense of keeping it open for business, and that if maintained it would necessarily be at a loss to the company. The court below sustained demurrers to these pleas. A trial was had on the first plea, which was a general traverse of the declaration, and a judgment obtained for the plaintiff. The defendant appealed.

Mayes & Harris, for appellant.

If the conclusions of the railroad commission under the statute, § 4328, code 1892, are subject to judicial inquiry, the pleas held bad upon demurrer in the court below set up facts which

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amply justified the appellant in closing its office at Fayette. But if the statute be construed as leaving the question absolutely subject to the will of the commission, then it is unconstitutional and utterly void.

The statute, so far as a very exhaustive research by us has disclosed, is unique—is *sui generis*; it stands alone, without precedent. It is not even in harmony with other sections of the chapter relating to the supervision of common carriers, of which it forms a part. The section should not be construed as having a retroactive operation; it should not be applied to offices which were in existence at the time of its enactment. To construe the section as so applying, and as leaving the whole matter in the discretion of the commission, renders it utterly indefensible, either by precedent or on principle, and makes it violative of the fundamental principles and most cherished provisions of both the state and federal constitutions. It arbitrarily appropriates the property of existing telegraph companies to public use without any pretense at compensation; it deprives the companies of property without due process of law; and it denies the companies the equal protection of the law. It is in derogation of common right, in that it deprives the companies of the right and freedom accorded to every other person—that of pursuing or abandoning a lawful occupation at will.

So construed and applied, when fully analyzed and reduced to its real value, it must be treated as if written thus: "A telegraph company shall not discontinue an office once established." The words, "without the consent of the commission," adds nothing, and should be treated as superfluous, because there is no provision by which the consent of the commission can be obtained. A telegraph company is as defenseless as if the words were omitted. The difference is immaterial between saying, "You shall not dispose of your property," on the one hand, and averring on the other, "You shall not dispose of your property without the consent of A," when no provision is made by which that consent can be obtained. In either case,

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one of the most valuable and essential attributes of ownership is taken from you absolutely; namely, the right of disposition. It is perfectly obvious that the value to the owner under such restrictions would not only be greatly diminished, but, in many instances, wholly destroyed, and, in some instances, no doubt, the very ownership would become an intolerable burden. The elementary text-books, treating of the right of the state to impose burdens upon the owners of property, tell us that all ownership is subject to certain qualifications, and that the state has the right to take private property for public use in certain instances: (1) By taxation, (2) by the exercise of the right of eminent domain, (3) public necessity (*salus populi suprema lex*—a branch of police power), and (4) in the exercise of what is called the police power.

Manifestly, the provision under discussion cannot find its defense in the taxing power. It cannot be defended as the exercise of the right of eminent domain, because no pretense of compensation or hearing is provided for or contemplated. It cannot fall under the head of public necessity. That right is based upon the maxim, *salus populi suprema lex*, and justifies the destruction or appropriation of private property to public use in cases of emergency—as, for instance, in time of war, or when property is destroyed to prevent the spread of fire or pestilence. The statute cannot be defended upon this ground; and, if defensible at all, it must be as an exercise of the other branch of police power, and we cannot find any recognized principle which gives support to the statute thereunder.

The basic principle upon which all legislation on the subject of regulating business concerns rests (and the judicial decisions trace it to this source), is to be found in the following extract from the treatise *De Portibus Maris*, by Lord Hale: "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree upon for craneage, wharfage, etc., for he doth no more than is lawful for any man—namely, make the most

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of his own. If the king or subject have a public wharf unto which all persons to that port must go to lade and unlade their goods, as for the purpose, because they are the only wharfs licensed by the king, or because there is no other wharf in that port, as it may fall out where the port is newly erected; in that case there cannot be taken arbitrary and excessive duties for craneage, wharfage, etc. Neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charges, for now the wharf, crane or other conveniences are affected with a public interest and they cease to be *juris privati* only." This clause is also quoted in the opinion of the court in *Munn v. Illinois*, reported in 94 U. S., 113, and is cited with approval as announcing the principle on which the decisions are based.

Now, we see, in analyzing this statement of Lord Hale, that the fact that the business is affected with a public interest has the effect of limiting the extent to which the owner can charge, and prevents the exaction of excessive duties or immoderate rates. It is nowhere intimated in this celebrated passage that because the crane or wharf is affected with the public interest, the state would have a right to confiscate the wharf or crane, or that, because it was affected with the public interest, the state would have the right to forbid the owner to cease operating it at any time he might see fit, or to compel him to establish other cranes or wharves. The extent of the power is to regulate the use, and not to compel a continuance of the use, or give the right to the state to appropriate property to its use without compensation, simply because it was affected with a public interest.

In the case of *Munn v. Illinois*, *supra*, Mr. Chief Justice Waite said: "Under these powers, the government regulates the conduct of its citizens one towards another, and the manner in which he shall use his property when such regulation becomes necessary for public good. In their exercise, it has been customary in England from time immemorial, and in this

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country from its first colonization, to regulate ferriers, common carriers, hackmen, bakers, millers, wharfingers, etc., and in so doing fix the maximum of the charge to be made for services rendered, accommodations furnished, and articles sold."

We see, therefore, that the authority upon which the court bases the right to regulate the charges and affairs of a warehouseman or a railroad company or a telegraph company, is derived from the same principle on which the right to regulate hackmen, bakers and millers is based.

Now, what would we say of an act of the legislature that would provide that a bakery, once established, should not be discontinued; or that hacks, once established, should not cease to run; or that millers should continue to grind so long as "A" or "B" required, or that the business should be extended when and where, in the opinion of "A" and "B," the public interest required. We stand aghast at the effect, when we undertake to apply this provision to these homely industries. But surely there is not one law for the baker and another for the telegraph company, or a different law for the hackman and the miller. What is law for one is good law for the other. It may not be put in force in reference to bakers or millers or hackmen, but, at the same time, if it is valid law in regard to the telegraph companies, a law which will say that bakers must continue to bake and millers continue to grind and hackmen continue to drive, would be equally defensible. It would make no difference in the case of the baker, if competition had reduced his business to a ruinous basis; it would make no difference to the hackman that the revenues which he obtained for the use of his hacks would not afford him a just return for his labor and for the money invested; it would make no difference with the miller that sufficient grist did not come to his mill to pay the wages of his employees, he must grind on. The baker must continue to buy flour and bake loaves whether he can sell them or not. If he had a dozen bakeries, he could not discon-

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tinue one to reduce his expenses; and, on the same principle, if the party to whose discretion the matter was confided saw fit to so determine, he could be compelled to establish other bakeries where, in the opinion of the dictator, the public interest would be subserved.

The right to regulate the use does not involve the right to compel the continuance of the use or the right to compel a citizen to devote his money, his time, or his labor, to public use without reward, or of depriving him of his liberty in regard thereto.

The court must see at a glance the disastrous and blighting effects of such legislation on all public enterprises. Who would embark in a business if the state could, at any time, arbitrarily lay its hands upon it and forbid its discontinuance, and compel him, against his will, to continue it or extend it? Such an exercise of power is utterly incompatible with the principles of a free government and contrary to the spirit of our institutions. It strikes not only at the root of the right of private property, but at the right of personal liberty as well.

We have used the homely illustrations above because they serve to throw a true and startling light on the possibilities of such legislation as that under consideration. When a corporation is the subject of legislation, we are too apt at times to allow that fact to blind us to the far-reaching consequences of the measures sought to be applied to it. It must not be forgotten, however, that the constitution, which takes under its protecting ægis the right of personal security, the right of personal liberty and the right of private property, places these three absolute rights on the same basis and extends its protection to the rich and poor alike—to corporations as to natural persons. A private corporation is a person within the meaning of the constitution. *Santa Clara County v. Southern Pacific Railroad*, 118 U. S., 394.

The fact that the business is carried on by a corporation cannot affect the question. It is not the character of the person

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which determines the rightfulness of the exercise of the power, but it is the character of the business which determines. It is true, a charter may cut a very material figure in determining the rights of the state and of the corporation in a particular case, but the fact of incorporation does not affect the principle. A man whose money is invested in the stock of a telegraph company is entitled to the same protection as one whose money is invested in a bakery or in a hack.

The fact that the companies are not dispossessed of their plants does not make the act constitutional, nor give it support. Nor does the fact that they may earn a profit cut any figure. Their earning a profit from the business is accidental and contingent on conditions which they cannot control, and does not necessarily follow. We have shown that conditions may arise, and are likely to arise, which would render the continuance of the business ruinous to the company, under the operation of the statute. The fatal defect in the law, as construed by the court below, is that it makes no provision for this. From one point of view, it might have been infinitely better for the companies if the state had actually dispossessed them and assumed the burdens as well as the benefits. As the law now operates, the state is the certain gainer, while the companies are saddled with all the risks, all the burdens, all the expenses, and all the loss.

“As property is the right to the entire or partial use or occupation or enjoyment of some specific thing, it may be taken by abrogating the right, or so dealing with the thing that the right cannot be beneficially executed or enjoyed.” 1 Hare on Constitution, 383.

“It is, notwithstanding, clear, as I have already stated, that the prohibition is not confined to the actual taking, but it includes every enactment which deprives the owner of rights in which property consists, or precludes him from putting his land or his goods to their appropriate use. He cannot, save in the due exercise of the police power, where the case impera-

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tively requires it, be forbidden to sell or directed how to hold or enjoy; nor can the use or the sale be placed under restrictions which amount to the prohibition or render the property valueless or useless. If the legislature can thus restrict the future acquisitions of a citizen, it has no such power over existing rights." 2 Hare, 755-759.

"Where a law annihilates the value of property, or strips it of its attributes by which alone it can be distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power." *Wynchamer v. The People*, 13 N. Y., 378-398.

"Depriving the owner of property of one of its attributes, is depriving him of his property within the constitutional provision." *People v. Otis*, 90 N. Y., 48; *In Re Jacobs*, 98 N. Y., 106.

"The third absolute right in every Englishman, is that of liberty, which consists in the free use and enjoyment of all his acquisitions, without any control or diminution save only by the law of the land." Blackstone's Commentaries, 138, 139.

"Depriving a company of the power to charge reasonable rates for the use of its property, and such deprivation taking place in the absence of an investigation by judicial machinery, deprives it of the lawful use of its property, and thus, in substance and effect, of the property itself." *Blachford, J., in Railroad Co. v. Minnesota*, 134 U. S., 462.

"One may be deprived of his liberty and his constitutional right thereto violated, without actual restraint of his person. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will and to earn his livelihood in any lawful calling and in the pursuance of any lawful trade or avocation." *In re Jacobs*, 98 N. Y., 106.

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Who will have the temerity to say that these constitutional provisions are not violated by an enactment which arbitrarily and absolutely prohibits one from abandoning a business if he sees fit to do so, or from reducing its limits when the exigencies of the business may require, or which arbitrarily compels him to extend it. The authorities above cited apply with peculiar force under a constitution like that of Mississippi, which contains this provision:

“SEC. 17. Private property shall not be taken or damaged for public use, except on due compensation first being made to the owner or owners thereof in a manner to be prescribed by law.”

Wiley N. Nash, attorney-general, for the appellee.

The two sections of our law, §§ 4328 and 4329, code 1892, under which the forfeiture was incurred, were enacted by the legislature in order, doubtless, to carry out the mandate of our state constitution, which provides “that the legislature shall pass laws to prevent abuses, unjust discrimination, and extortion in all charges of . . . telegraph companies, and shall enact laws for the supervision of . . . telegraph companies . . . by commission or otherwise, and shall provide adequate penalties to the extent, if necessary for that purpose, of forfeiture of their franchises.” And the constitution further provides (§ 195), that telegraph companies are common carriers in their business, and subject to liability as such.

Now, the only question in this case is this: Was the judgment, order, and determination of the railroad commissioners, in ordering the Fayette office kept open, right and proper? That it was not right and proper was the only defense that could have been made in the court below. By § 4284, code 1892, it is provided “that whenever any matter is determined by the commission in the course of any proceeding before it, the fact of such determination, duly certified, shall be received in all the courts and by every officer in civil cases as *prima facie* evidence that such determination was right and proper.”

Brief for appellee.

In this case, under the declaration and the general issue, all necessary and proper matters could have been tried and determined by a jury of the country, with an appeal to the supreme court by either party, if desired. The special pleas were wholly unnecessary, and the court below cannot be said to have committed reversible error in sustaining demurrers to them, and this without reference to the facts sought to be set up by them. Appellant must show error in some other part of the case before becoming entitled to a reversal. I have yet to learn that it is necessary to specially plead the unconstitutionality of a particular act, matter or thing in order to get the benefit of it.

It must be borne in mind that the telegraph company, the appellant, brought the matter of discontinuing the Fayette office before the commission by its petition asking consent for the office to be closed. The commission heard the matter, and adjudged that the office should be continued. Now, I contend that the telegraph company, having submitted to the commission the settlement of this question, having sought and elected this forum, it is bound by its decision. The law is: "An election is binding upon the party making it, and he cannot afterwards pursue an inconsistent remedy, though full recovery may not be had in the first action." 6 Am. & Eng. Enc. L., 250; *Bailey v. Hervey*, 135 Mass., 172; Herman on Estoppel and Res Adjudicata, vol. 2, 1178; *Thompson v. Howard*, 31 Mich., 309-312.

The pleas do not show that the keeping open of the office in Fayette in any way interferes, or would interfere, with the transmission of messages from one state to another. The attention of the court is called, in this connection, to the case of *Louisville, etc., R. R. Co. v. State*, 66 Miss., 671-675.

It is manifest, from the pleas, that the statute is resisted because it imposes a burden, not on commerce, but on the company. The law is clearly constitutional.

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Argued orally by *J. B. Harris*, for appellant, and by *Wiley N. Nash*, attorney-general, for appellee.

COOPER, C. J., delivered the opinion of the court.

The demurrer to the second plea was properly sustained. For all that appears by said plea, the defendant company was engaged in domestic as well as interstate transmission of messages, and, if it was, it was subject to such reasonable police regulations as the state saw proper to impose for securing conveniences to the people. The fact that the company was chartered in another state and secured its right to erect its lines along the post roads in the state by virtue of authority derived from an act of congress, does not release it from any and all local police regulation.

The demurrer to the third and fourth pleas should have been disallowed. The findings and determination of matters committed to the railroad commission by it are not final and conclusive, and was never so intended by the statute. It is a mere administrative agency, although, in some respects, it exercises *quasi* judicial power. But at last the reasonableness and consequently the lawfulness of its determination is left subject to judicial inquiry and decision. If a common carrier, required by the commission to do an act, is of opinion that the requirement is a violation of its legal rights, it may refuse compliance, and if, upon judicial inquiry, its contention is supported, is not punishable or liable for a failure to comply. But it takes the risk of coming under all penalties and liabilities declared by the statute, if, upon such inquiry, the courts uphold the action of the commission. The statute, in express language, so provides. Section 4284 of the code declares that "all findings of the commission and the determination of every matter by it, shall be in writing, and proof thereof shall be made by a copy of the same, duly certified by the secretary under the seal of the commission; and whenever any matter has been determined by the commission, in the course of any proceeding

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before it, the fact of such determination, duly certified, shall be received in all courts and by every officer in civil cases as *prima facie* evidence that such decision was right and proper."

The facts set up by the third and fourth pleas, and admitted to be true by the demurrers, furnish ample justification for the action of the appellant in closing its office at Fayette.

The judgment is reversed.

ALBERT TUCKER v. ADA TUCKER.

1. HUSBAND AND WIFE. *Action by wife against one inducing her abandonment. Liability of husband's father therefor.*

A father is liable in damages to the wife of his son for maliciously persuading the son to abandon her, although not held to the rigid accountability imposed upon strangers—the gravamen of the action against a parent being malice.

2. EVIDENCE. *Conversations. Admissions.*

In a suit by a wife against her father-in-law, for inducing her husband to abandon her, conversations between the plaintiff and defendant after the abandonment are admissible, though not in the nature of confessions by defendant, if they tend to show the motives with which defendant acted in the matter charged.

3. FEMALE WITNESS. *Character for truth. Chastity.*

The character of a female witness for truth may not be impeached by showing her to be of probable unchaste character. (Whitfield, J., *dubitante*.) But if a party show by his own female witness that the witness was seen in a brothel, and facts tending to show that she was entrapped therein by his adversary, the whole matter may be inquired into.

4. INSTRUCTION. *Juries not judges of the law.*

An instruction that the jury are "the exclusive judges of the evidence, its weight and effect," is ambiguous. If the word "effect" embraces legal effect, the instruction is wrong.

FROM the circuit court of Lee county.

HON. NEWMAN CAYCE, Judge.

Brief for appellants.

Ada Tucker sued Albert Tucker, her husband's father, charging in her declaration that the latter had maliciously enticed, persuaded, and induced her husband, Norman Tucker, to abandon her. This charge was denied, and the case was presented to a jury. The testimony was conflicting. On the cross-examination of the plaintiff's most material witness, Immogene Hyatt, she was asked by appellant's attorney: "Were you not arrested by the police of Indianapolis, in January or February of this year, in a house of ill fame, with a man styling himself Wilson?" The court sustained an objection, and the question was not answered. Upon re-examination of the witness by plaintiff's attorney, she testified concerning her arrest, and claimed that she was entrapped by Wilson, who was a private detective employed for the purpose, and her testimony tended to show that Wilson was in the employ of appellant. After this, the appellant's attorney was denied the right to cross-examine the witness concerning the Indianapolis episode. The jury found for the plaintiff, and awarded her ten thousand dollars' damages. Appellant's motion for a new trial was overruled.

Allen & Robins, for appellants.

The court below erred in unduly limiting the cross-examination of the witness, Immogene Hyatt. The case mainly depended upon her testimony, and appellant should have been permitted to cross-examine her touching the "scheme" which she claimed culminated in her arrest by the police of Indianapolis in a house of ill fame.

Malice is of the essence of a suit like this against a parent, and the instructions given for the plaintiff are wrong, because they negative or obscure this essential element of the case. Chancellor Kent, the great American jurist, in one of his happiest opinions, in which he argues the question with force, shows conclusively that, before any action can be maintained against the parent, malice must be alleged and proven. *Hutch-*

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eson v. Peck, 5 Johns., 195. The same doctrine is announced in *White v. Rose*, 47 Mich., 174. See, also, *Smith v. Lyke*, 13 Hun (N. Y.), 204; *Reed v. Reed*, 6 Ind. App., 317; *Railsback v. Railsback*, 12 Ind. App., 659.

The case of *Mehrhoff v. Mehrhoff*, 26 Fed. Rep., 13, is quite an interesting one on the subject. There a demurrer to a declaration against a father for enticing away his son was sustained because the declaration did not charge that the father had, in what he was alleged to have said to the son, imputed to the wife any offense against his marital rights. The case decides emphatically that to hold the father liable he must have made such a charge and it must have been false. This is good sense and good reason, as well as good law, for a man is only held, in ordinary transactions, to be accountable for the ordinary and necessary consequences of his acts. If a man loves his wife, no imputation against her by anyone, save of broken vows or moral turpitude, would induce him to leave her or would cause him to cease to love her. We cite the court to the following additional authorities: Schouler on Dom. Relations, secs. 64, 65, pp. 57, 58; Cooley on Torts, 228, note; Webb's Pollock on Torts, 271 and note; *Bennett v. Smith*, 21 Bar., 439; 31 Central Law Journal, 32, note.

Sykes & Bristow, on same side.

The question lying at the very foundation of the action is the "*quo animo*," or the intent of the parent in advising the child; and the presumption is always in favor of the fairness and innocence of a parent's counsel to his child. Where it is claimed that the estrangement and abandonment was caused by the advice of a parent, it is much more difficult to make out a proper case for damages than where the defendant is a third party or stranger. The line of demarcation between parental admonition and advice given from a sense of duty on the one hand, and that same counsel colored by malice on the other hand, is difficult to trace, and it must be borne in mind that all pre

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sumptions are in favor of the parent's good faith. If a stranger, one not authorized to counsel husband or wife as to their marital relations, by uncalled for advice, causes an estrangement of conjugal affection, the law would stamp such conduct, though of the same nature as that which, in a parent, would be innocent or even praiseworthy, as malicious and as unlawful officiousness. The relationship of the party advising to the party advised necessarily constitutes an important factor in the process of determining the animus of the advice; a parent is given a much wider latitude in such cases than a stranger. *Hutcheson v. Peck*, 5 John., 196; *Schouler's Dom. Rel.*, 57, 58; *White v. Ross*, 47 Mich., 172; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep., 13; *Payne v. Williams*, 4 Bax. (Tenn.), 583; *Bennett v. Smith*, 21 Barb., 439; *Burnett v. Burkhead*, 21 Ark., 79; *Winsmore v. Greenbank*, Willes' Rep., 581.

The rules of law above stated, and so abundantly supported by well-reasoned authority, were disregarded by the court below, both in its rulings on questions of evidence and in granting the instructions given for the plaintiff.

The court certainly erred in not allowing the plaintiff's witness, Immogene Hyatt, who was the very backbone of the plaintiff's case—the *sine qua non* of its institution and maintenance—to be cross-examined concerning the "scheme" by which she claimed to have been entrapped into the brothel at Indianapolis. No better illustration of "technicality run mad" can be found than the ruling of the court below on this subject.

Blair & Anderson, and *Finley & Long*, for appellee.

The main question, and one vital to the case, is: Has a wife a right of action against a third person for procuring her husband to abandon her? Some courts, and some authorities, we frankly confess, hold that she has not. But we think these decisions and authorities are founded on the common law view of the personal rights of the wife, and her identity in law with the husband. These distinctions and discriminations, if ever

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just and true as applied to this question, have, we think, been all swept away by legislation. The legislation of Mississippi on this subject is of a distinguished character, and that it is so is a matter of pride to every gentleman. We respectfully refer to the following authorities: *Williams v. Williams*, 37 Pac. Rep., 614; *Haynes v. Nardin*, 129 Ind., 581; *Adams v. Main*, 3 Ind. App., 232; *Holmes v. Holmes*, 133 Ind., 386; *Railsback v. Railsback*, 40 N. E. Rep., 276.

Argued orally by *J. Q. Robins*, for appellant, and by *J. A. Blair*, for appellee.

WOODS, J., delivered the opinion of the court.

The action of the court below is complained of by the appellant in twenty-one assignments of error. We notice such only as are necessary to the determination of this appeal.

The sixth, seventh, eighth, and ninth assignments may be disposed of together, and briefly.

The conversations had between appellant and appellee, which, it is alleged, were improperly permitted to go to the jury, because not given notice of in the bill of particulars, occurred long after Norman Tucker had deserted the appellee, and were inadmissible as evidence showing, or tending to show, the substantive offense charged in the declaration. That offense, if ever committed, was long past, and the subsequent conversations of appellant, if offered as evidence to show the independent fact of desertion by reason of appellant's wrongful persuasion and inducement thereto, were competent, in this aspect, only if they were in the nature of confessions. That they were not of the character of confessions is plain, and, looked at as they are by complaining counsel, they were incompetent. But, looked at as evidence showing, or tending to show, the motive of appellant in his supposed wrongful action, they were competent; for, as counsel for appellant ably and correctly argue throughout their exhaustive brief, the motive of the appellant was a

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question of the first importance. If these conversations are given their fair and legitimate construction, they should be found to be helpful to the defense, for, in one of them, the appellant—the father of appellee's husband—expressed to appellee the opinion that it would be best for appellee and her husband to remain apart. But, however a jury may regard this, we think they were competent as tending to show motive in appellant.

The tenth, eleventh, twelfth and thirteenth assignments may be properly considered together. It was sought to show by Imogene Hyatt that she had, some time before the trial of the cause, been arrested, with a male companion, in a house of ill fame in Indianapolis, in the state of Indiana. This the court refused to permit to be done by appellant's counsel on their cross-examination of the witness, but, on re-examination, allowed the witness to make an extensive statement as to circumstances offered to show and tending to show that, on that occasion, by the machinations of appellant and others nearly related to him, she was entrapped into that dishonorable position. After this re-examination, appellant's counsel proposed to cross-examine the witness on this new evidence, and their request was twice refused. That the course pursued by the court was unfair to the appellant, is manifest, and that it was essentially prejudicial to appellant, is too clear for disputation. The witness was permitted to make quite a full statement of facts as to her being arrested in a house of prostitution, and as to her having been "entrapped" therein by the appellant's agency, as the necessary implication was, and then the door to all further inquiry on this line was closed, thus leaving the appellant to the mercy of the jury, branded by the witness as one who had wickedly had her entrapped into the horrible situation indicated, and whose mouth, as well as that of his accusatory witness, was absolutely shut to any defense he might have been able to make to this damning evidence against him.

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Now, the character of a witness for truth may not be impeached by showing her to be of probable unchaste character, and the evidence as to Mrs. Hyatt's having been arrested in the brothel was, in the first instance, properly excluded; but the court should have continued to exclude it, and, assuredly, in common fairness, it should not have been permitted to be used by appellee to her heart's content, and any attempt to examine into it have been denied appellant. The effect of this action of the court was, we repeat, necessarily, and immensely, prejudicial to appellant.

Before proceeding now to consider the mistake of law which runs through the instructions generally, we desire to call attention to the ambiguity of the language of appellee's first charge. By it the jury were told that they were "the exclusive judges of the evidence, its weight and effect, and of the credibility of the witnesses." For appellant, it is earnestly contended that by this charge the jury were told that they were judges of the weight of the evidence and of its legal effect. In other words, that they were made judges of the law as well as of the facts. Of course, the answer of appellee's counsel is that this is not the natural or reasonable interpretation of the charge, and that by the use of the word effect, the jury were intended to be informed, and, in fact, were only informed, that they were the judges of the weight of the evidence and of its value as showing what facts might be said to be fairly established by it. That able and accomplished and upright counsel differ so widely as to the meaning of the language, makes it, at least, not amiss to suggest the obviation of this objection by other and unambiguous language on another trial.

A few general observations on the law applicable to the conduct of a parent in counseling and advising a married child, in cases of this character, will suffice to show the erroneous view which prevailed in the trial below, without considering seriatim the charges given and refused, or modified by the court.

In every suit of this character, the prime inquiry is, from

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what motive did the father act? Was it malicious, or was it inspired by a proper parental regard for the welfare and happiness of the child? The instinct and the conscience unite to impose upon every parent the duty of watching over, caring for, and counseling and advising the child at every period of life, before marriage and after marriage, whenever the necessities of the child's situation require or justify such action on the parent's part. The reciprocal obligations of parent and child last through life, and the duty of discharging these divinely implanted obligations is not, and cannot be, destroyed by the child's marriage. Multiplied instances will occur to the mind in which a failure of the father to speak and to act would be regarded with horror. A daughter who has recklessly contracted an undesirable marriage with a man utterly unworthy to be the husband of a virtuous woman, against the wish and over the vigorous protest of the father, and who has, by such ill-starred union, been brought to wretchedness and humiliation and want of the ordinary comforts of life, may surely be advised, counseled, and cared for in the paternal home, even against the will and expressed wish of the unfaithful husband. The question always must be, was the father moved by malice, or was he moved by proper parental motives for the welfare and happiness of his child? In his advice, and in his action, he may have erred as to the wisest and best course to be taken in dealing with a question so delicate and so difficult, but he is entitled, in every case, to have twelve men pass upon the integrity of his intentions.

The third, fourth, and seventh instructions given for the appellee ignore this rule of law, and put the father upon the footing of a stranger who intervenes between husband and wife, and they are therefore erroneous. For the same reason, the first, ninth, eleventh, and twelfth instructions asked by appellant should have been given as asked, and without the modifications made by the court.

Cases of this character do not abound, and the present appeal

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presents the question of the father's liability for the first time in our courts. The learned court, and able counsel for appellee, misconceived the liability of the parent, and held him to the rigid accountability imposed upon strangers who invade the domestic circle and separate husband and wife. See *Hutcheson v. Peck*, 5 Johns. (N. Y.), 195; *White v. Ross*, 47 Mich., 173; *Burnett v. Burkhead*, 21 Ark., 77; *Payne v. Williams*, 4 Bax. (Tenn.), 583.

Reversed and remanded.

WHITFIELD, J., specially concurring.

I concur in the result reached, and write only to save myself from committal to the proposition announced in the opinion in chief, that the fact that a woman is a common prostitute may not be shown to impeach her veracity. In *Smith v. State*, 58 Miss., 867, it is stated that the earlier rule in this state was that this could not be shown, and that these cases were overruled in *Head's case*, 44 Miss., 731, and *Head's case* was, on that point, overruled by *Smith's case*. There is a partial collection of the authorities in *Smith's case*. The English rule supports *Head's case*, as do many of our state supreme courts. *Taylor on Ev.*, vol. 3, sec. 1471 and note 3; *Rice on Ev.*, vol. 3, p. 367; *Real v. People*, 42 N. Y., 280. I do not now express any opinion on the point, reserving such expression for a case presenting the question for decision.

Statement of the case.

J. W. HORNE v. W. L. NUGENT ET AL.

1. DEED. *Acknowledgment. Sunday.*

The record of a deed is not invalidated, nor its effect as constructive notice impaired, because the acknowledgment is erroneously dated on Sunday.

2. DELIVERY. *Witness. Code 1892, § 1740.*

Notwithstanding the death of the grantor in a deed, the testimony of the grantee in his own behalf is admissible to prove the delivery of the instrument as against one claiming under the same grantor by subsequent special warranty deed, a failure of the latter title imposing no liability on the decedent's estate.

3. EXECUTION SALE. *Purchaser. Volunteer.*

A purchaser at an execution sale is a mere volunteer, and takes only such title as the execution debtor had, and with all of its infirmities.

FROM the chancery court of Harrison county.

HON. W. T. HOUSTON, Chancellor.

J. W. Horne and Charles Humphries filed their bill of complaint against W. L. Nugent and others, averring that the complainants were each the owner of an undivided one-third interest in a large body of land, described, and that defendants owned the remaining one-third interest, but showing further that defendants claimed the whole and denied complainant's rights. The bill sought, primarily, to cancel this claim to the whole as a cloud upon complainants' title to their respective interest, as authorized by § 3101, code 1892, and for partition between the parties.

The deed under which complainants claimed was the subject of litigation in this court in the case of *Saffold v. Horne*, 72 Miss., 470, and the question of its validity was again litigated in this cause. The deed is copied in the opinion in that case, page 480, and it was recorded in the record of deeds of the

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county before defendants became interested in the land. Confining this statement to facts not appearing in the report cited, it may be said that it was made to appear in this case that the acknowledgment to the deed was taken on a week day and erroneously dated as if on Sunday; that after the execution of the deed and its record the grantor therein, one Saffold, and a Mr. Henderson, conveyed by special warranty to the Union Investment Company. It was shown that Henderson had no interest in the land; that he bid the same off at a tax sale by request of Saffold, and paid the bid with money advanced for the purpose by the latter, and held the tax title as Saffold's appointee. The Union Investment Company negotiated its purchase with Saffold, and was found by the court to have had knowledge of Henderson's relation to the land before its purchase. A part of the land was sold under execution against the Union Investment Company and was purchased by Nugent, under whom the other defendants held. The suit was dismissed by Humphreys, but was continued by Horne, whose deposition, taken in the case in his own behalf, was by the court below suppressed on defendants' motion. Upon final hearing a decree was rendered in favor of the defendants, and Horne appealed.

J. & J. M. Shelton, and Calhoon & Green, for the appellant.

The deposition of Horne was erroneously suppressed. Saffold's estate is not involved. *Love v. Stone*, 56 Miss., 449; *Cole v. Gardner*, 67 Miss., 670; *Jackson v. Smith*, 68 Miss., 53; *Griffin v. Lower*, 37 Miss., 458; *Lamar v. Williams*, 39 Miss., 342; *Faler v. Jordan*, 44 Miss., 283; *Fennell v. McGowan*, 58 Miss., 261; *Combs v. Black*, 62 Miss., 831. This court upon proof not as strong as that in this case, even with Horne's deposition suppressed, has held the instrument on which appellant's right is based to be a deed, and not a will, and that it was delivered and accepted. *Saffold v. Horne*, 72 Miss., 470. The acknowledgment is valid for all purposes.

Brief for appellant.

The certificate of the officer is not that Saffold appeared before the officer on the day of its date; it is simply a certificate that he had previously appeared and acknowledged the execution of the deed. It is not at all necessary to its validity that the acknowledgment should be dated, and if it be erroneously dated, as is abundantly shown by the evidence in the case, it will not be invalidated thereby. Am. & Eng. Enc. L., vol. 1, 153, and authorities cited. When an officer takes an acknowledgment he performs a judicial act, but when he subsequently certifies it he is performing a ministerial and clerical act, which he may perform during his incumbency of the office, if the rights of third persons have not intervened. *Harmon v. Magee*, 57 Miss., 410. A ministerial act is valid though performed on Sunday. Am. & Eng. Enc. L., vol. 5, 85, and authorities cited. It would be curious indeed if the rights of parties could be destroyed by the act of an officer taking an acknowledgment bunglingly misstating the date to his certificate so as to throw it on Sunday. The strictest sabbatarian ought not to so contend.

“If a deed be made on Sunday, it is void; but, as it takes effect from delivery, although it be signed and acknowledged on Sunday, if delivered on Monday, it is by law good.” Parson’s on Contracts, vol. 2, p. 762.

Love v. Wells, 25 Ind., 503; *Beitenman’s Appeal*, 55 Penn. St., 183; *Flanagan v. Meyer*, 41 Ala., 132; *Luens v. Larkin*, 1 Pickle (Tenn.), 355: No inference that the deed was delivered on Sunday can be drawn from the date or language of the acknowledgment.

That the sale of the land for taxes, and its purchase by Henderson, under the facts of this case, were invalid, cannot be denied. *Cohea v. Hemingway*, 71 Miss., 22. The Union Investment Company is abundantly charged with notice, and cannot pose as an innocent purchaser from Henderson.

Horne is not estopped to claim title, even if he stood by and saw the sale from Saffold and Henderson to the Union Invest-

Brief for appellee.

ment Company and remained silent. His title was of record and he was under no sort of obligation, legal or equitable, to interpose. *Murphy v. Jackson*, 69 Miss., 403; *Sulphine v. Dunbar*, 55 Miss., 255; *Love v. Stone*, 56 Miss., 449; *Staton v. Bryant*, 55 Miss., 261.

Under the facts it would have been indelicate and impertinent for Horne to have interfered in the private negotiations of the parties, which were not directed to him, and but little of which he could have heard. A purchaser at execution sale is a mere volunteer, and Nugent and those holding under him are not innocent purchasers. *Kelly v. Mills*, 41 Miss., 267, and numerous other cases in our books.

W. L. Nugent, in propria persona.

The force and effect of the conveyance from Saffold to Horne and Humphries has been adjudicated by this court, but the issues involved here have never been adjudicated. The appellant was present when the sale from Saffold to the Union Investment Company was made, knew all about it, made no objection to it, and actually participated in the inception of the transaction. On these grounds the trial court adjudged against him, and properly decreed a dismissal of his bill. *Staton v. Bryant*, 55 Miss., 261; *Railroad Co. v. Ragsdale*, 54 Miss., 200; *Tilton v. Nelson*, 27 Barb., 595; *Morris v. Moore*, 11 Hum., 433; *Luens v. Parks*, 84 Mich., 202; *Gray v. Crockett*, 35 Kan., 686; *Sumner v. Sexton*, 47 N. J. Eq., 103.

The conveyance under which the appellant asserts title was acknowledged on Sunday, and its registration was unwarranted. Registration of an instrument without a precedent valid acknowledgment is no registration at all, and does not communicate constructive notice.

The Union Investment Company, under its conveyance from Saffold, took full title to the lands, and this title was conveyed to appellee by the sheriff. The judgment recovered against that company fixed a lien on the land, and the levy of the exe-

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cution upon it and the sale fixed the rights of appellee beyond controversy. *Dixon v. Cook*, 47 Miss., 220; *Bass v. Estell*, 50 Miss., 300; *Wasson v. Connor*, 54 Miss., 351; *Duke v. Clark*, 58 Miss., 465; *Mississippi Valley Co. v. Railroad Co.*, 58 Miss., 846; *Nugent v. Priebatsch*, 61 Miss., 402.

The tax title to Henderson, under the facts of this case, invested title and cut off complainants' claim to the land. The averments of the bill in assailment of the tax title are not maintained as against the subsequent purchasers by the proof. The investment company had no knowledge of its infirmities.

Even according to the testimony of Horne and Humphries, the deed from Saffold to them was never intended as a grant *in presenti*, and was never accepted as such. It is apparent that appellant knows he is pressing an unconscionable suit, and that only because he thinks he has a technical advantage; but, in a court of equity, this will not be allowed, except, perhaps, in a case free from laches or fraud. The deed remained in Saffold's possession until his death. Saffold remained in possession, and this, too, under an agreement that he should have the right to do so. Title was not asserted by appellant for twenty years after the deed was made, and until after Saffold died. *Parmelee v. Simpson*, 5 Wall., 86; *Jackson v. Cleveland*, 15 Mich., 101; *Miller v. Gore*, 20 Pick., 28; *Hawks v. Pike*, 105 Mass., 560; *Maynard v. Maynard*, 10 Mass., 456; *Jackson v. Phipps*, 12 John., 418; *Younge v. Guilbeau*, 3 Wall., 641; *Dikes v. Miller*, 24 Texas, 423; *Tompkins v. Wheeler*, 16 Pet., 119; *Denny Bank v. Webster*, 44 N. H., 268; *Cole v. Gill*, 14 Iowa, 529.

Argued orally by *J. M. Shelton*, for appellant, and by *W. L. Nugent*, *in propria persona*.

WOODS, J., delivered the opinion of the court.

1. That there was due execution of a deed from Saffold to Horne and Humphries, and that there was delivery of the

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same, has already been determined by us. *Saffold v. Horne*, 72 Miss. With the additional evidence found in the transcript of the present appeal (including that of Horne, improperly excluded below), the due execution and delivery of the conveyance is brought out in clearer light.

2. That this conveyance was the proper subject of recordation is clear. It is certain that the acknowledgment to the deed was not taken on Sunday, though, by a mere clerical mistake such appears to be the fact.

3. That after 1874, when the deed was put to record, every one had constructive notice of the title of Horne and Humphries, and was bound thereby, unless relieved in some way thereafter, is not denied.

4. That Saffold permitted the lands to be sold for non-payment of taxes for the purpose of re-acquiring title to the same, with all clouds removed by a sale to one selected by him for that purpose, and a reconveyance after the expiration of the period of redemption, is fully and clearly shown by the evidence of Judge Henderson, as is Henderson's connection with that transaction. Henderson was the mere conduit through which Saffold sought to have his title to an undivided one-third interest in the lands flow back after a tax sale, freed from all defects and doubts, whereby he would be vested with the fee to the entire body of lands. No one can doubt Saffold's purpose or his attempt to carry it out through Henderson.

5. That the Union Investment Company had actual notice of this scheme of Saffold, and of Henderson's want of, and disclaimer to, any interest in the lands, at and before its acquisition of title in July, 1887, not only satisfactorily appears in the deposition of Henderson, but is proclaimed with myriad voices by the entire transaction, begun in February and ended only in July, in which and everywhere Saffold is treated as the real owner, and Henderson as in such attitude as to the lands as not to require any participation, on his part, in any negotiations leading to the sale. And when the sale occurred, as in

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every instance preceding it, Saffold was treated as the owner. The \$500 cash was paid to Saffold; the \$1,800 bank check was made payable to Saffold, and given to him, and the certificate showing that the railroad company was to issue its stock to the amount of about \$7,000 was made out in Saffold's name, and delivered to him. According to Judge Henderson (and his evidence is not at all disputed here), he only united finally in the deed with Saffold to the railroad company because of Saffold's request, in which the representative of the investment company united, as he (Henderson) thinks. No impartial man can arise from a full study of this whole record without an abiding conviction that the investment company had full notice of Henderson's connection with the lands and his want of interest in them, and that the company knew exactly what it was doing and what Saffold had done. The company had notice of the title of Horne and Humphries by the record of their deed, and, to our minds, it is clear that the company had actual notice of Henderson's connection with the lands and his want of any beneficial interest in them. The foundation stones of the company's title being thus torn up, that of purchasers at execution sales claiming thereunder, must be uprooted also. Such purchasers are volunteers, and take only such title as the execution debtor had, and with all its infirmities.

We have already said that the deposition of Horne was improperly excluded on the hearing below, and we restore it, on examination by us of the case. Saffold's estate is no party to this litigation, and can in no way be affected by it. By his deed to the company, he guardedly warranted specially only. With Horne's deposition restored, there remains no pretense for the assertion of the doctrine of estoppel against him. He neither knew of nor participated in the sale from Saffold to the investment company. In his deposition, he says he first knew that Saffold had sold some lands to the company after the transaction had been completed, and after he and Saffold had left Mississippi City, the place where the sale was effected, and, in

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the absence of any and all evidence in conflict with this, his statement must be taken as true.

We do not concur in opinion with the learned court below in the deduction which it drew from the presentation of exhibit to cross-interrogatory 12, in the deposition of Captain Hardy, nor do we attach that importance to the possession of this exhibit by the solicitor of Horne which the court below did. If, however, it was of that importance, on the showing made, the court should have reopened the case, that Horne might have been examined as to his possession of the paper.

Reversed and remanded.

CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI,

—AT THE—

OCTOBER TERM, 1896.

R. P. MILLER *v.* DELTA & PINE LAND CO.

1. TAX COLLECTOR. *Advertisement of land. Code 1892, § 3811.*

Under § 3811, code 1892, if the taxes on lands are unpaid after the fifteenth day of January, the tax collector is vested with a limited discretion as to when the advertisement of the lands for sale is to be made. He may advertise them on the sixteenth day of January, or any succeeding day, so that they are advertised for three weeks before the day of sale.

2. SAME. *Fees, ten per centum damages. Code 1892, § 2021.*

Under § 2021, code 1892, a tax collector is entitled to ten per centum on all taxes not paid until after December 15 and after legal action has been begun to coerce payment, and legally advertising the property for sale is such action.

3. SAME. *Injunction.*

The tax collector will not be enjoined from collecting the ten per centum provided by law on the grounds that the publication could have been begun later, and that the collector knew the taxes would be paid.

4. SAME. *Payment after action begun.*

Though a tax collector's proceedings to enforce collection be interrupted by payment of the taxes, he will be entitled to the per centum because of coercive action begun.

Brief for appellant.

FROM the chancery court of Sunflower county.

HON. A. H. LONGINO, Chancellor.

The facts are stated in the opinion of the court.

Mayer & Harris, for the appellant.

We contend, in the first place, that, in case of actual and indisputable delinquency, such as is shown in this cause, the language of the statute is clear and explicit; that for taxes collected by the officer he is entitled to his ten per centum commission, even though he performs no other service than the reception of the money and the receipting therefor. And we contend, in the second place, that if the court shall not adopt this view, then whenever the tax collector, in the discharge of the duty imposed upon him by law, shall have performed any service whatever towards the actual collection, he becomes entitled to his commission; and his right to his commission is not postponed until the completion of the service by a perfected collection by adverse process. We claim that the action of the tax collector in this case, by making out the tax list, and placing the same in the hands of the printer, and posting notice at the courthouse door, was such action as entitled him to his commission for money actually received by him. The line must be drawn somewhere; and we submit that the safest and best place to draw the line is just where the clock strikes twelve on the night of December 15, because that is the place indicated by the statute. The next best place for the line is just where the tax collector, in case of settled delinquency, begins to bestir himself in the exercise of his ministerial duties to enforce the law.

We observe that counsel for the appellee indulge some criticism of the tax collector in this case, on the idea that his action in making out his tax list of delinquents and handing the same to the paper for publication on January 15, was precipitate and censurable. We deny that. We deny it, in the first place, on the ground that his action was authorized by law, and that

Brief for appellant.

no public functionary is to be criticised or censured for doing that which the law authorizes. We deny it, in the second place, on the ground that his action, being authorized by law, was justified further by the ordinary consideration of prudence and discretion. He himself states that he did it in order to guard against the always possible dangers of mistakes and mis-carriages; and even in the absence of such a statement, the course adopted by him would be manifestly the wise and prudent course, for the reason that an early advertisement gives opportunity to correct any errors and mistakes; whereas, if the course suggested by counsel as being the only justifiable one to adopt, was pursued (which is to postpone the advertisement until the last three possible weeks before the sale), a typographical error in the advertisement could not be corrected at all.

Baker & Moody, on same side.

In the case of *Anderson v. Hawks*, 70 Miss., 639-645, in construing § 2021, code 1892, this court say: "The language of the law is that the collector shall be entitled to receive from the delinquent taxpayer ten per centum on all taxes collected after the fifteenth of December, by distress or otherwise. The words 'distress or otherwise' obviously relate to the taxes on which the per centum is to be calculated, and not to the ten per centum only. The collector is entitled to ten per centum on such taxes as shall be collected by him after the fifteenth of December, by distress or otherwise. Keeping in view the fact that the allowance is made as compensation for services, and that delinquent taxes may be collected (1) by distress and sale of personal property (code 1892, § 3802); (2) by sale of land (*Ib.*, §§ 3811-3815); (3) by certifying the assessment to other counties in which the delinquent may have property (*Ib.*, § 3822); (4) by suit (*Ib.*, § 3747); (5) by action on the bond required of transient traders (*Ib.*, § 3871), it is not difficult to discover the meaning of the words 'distress or otherwise,'

Brief for appellant.

which, upon familiar rules, are to be construed as applying to matters *ejusdem generis* as the preceding particular words, a contrary intention not appearing.”

Did appellant, therefore, in this case, perform the labor necessary to entitle him to the ten per centum damages? We think so. He posted the notice of sale at the courthouse door, as the law required, and gave the same to the printer to be advertised in his paper, all of which was done before any tender of the money had been made to appellant. So far as the appellant was concerned, there was nothing more for him to do except sell the land when the day for sale arrived. For making the sale he was allowed additional fees, and if, after advertising the land, the taxes had been paid to him, such collection would be all that the law expected to accomplish by having the same sold, and we see no reason why, under such circumstances, appellant would not be entitled to the additional compensation allowed by law of ten per centum upon the amount thereof.

Counsel for appellant relies upon the case above cited to maintain his position, but we submit that the case at bar and that case are not at all analogous. In that case, Hawks, the taxpayer, was endeavoring all the time to ascertain the amount of his taxes, in order that he might pay the same, but the tax collector did not have the assessment roll at the time the law required it to be in his office, so the taxpayer failed to ascertain the amount thereof, and it was for this reason that he was delinquent at all. In the case at bar, however, appellee not only failed to pay its taxes on or before the fifteenth of December, the time in which the law made it its duty to do so, but it was in default for near thirty days before it made any effort whatever to pay the same, and then, at that time, it wholly disregarded the law as to that in which it should pay its taxes. Again, appellee never made any effort to ascertain from appellant the amount of its taxes, neither did it make any effort to ascertain if a check would be accepted. By such action appellee was not only guilty of negligence, but acted in

Brief for appellee.

utter disregard of the plain requirement of the law. It seems to us, therefore, that such action on the part of the appellee is not such as would commend itself to a court of equity. Again, in the above cited case, *Anderson*, the tax collector, had performed no service whatever by which he could ask the court to allow him the ten per centum damages as compensation therefor. In this suit it is different. Here appellant was not only put to the trouble of listing appellee's lands, but he, in fact, had the same advertised before any money had been tendered to him, and, so far as he was concerned, there was nothing else he could do, as we have stated, but sell the land, for which service he was allowed additional compensation.

Frank Johnston, for appellee.

1. The ten per centum damages is not a penalty, but compensation for the services enumerated in the statute. And the particular service for which the compensation is allowed must have been rendered, and it must come within the terms of the statute.

2. The tender was made before the publication of the notice of sale. And the tax collector, after the tender had been made, had no authority for advertising the land, and was not entitled to the damages.

3. All that was done, before the tender by the collector, was to make out a list of the land and hand it to the printer. And this was done on January 15. This service is not one enumerated by the statute which entitled the tax collector to the damages.

4. The advertisement of the sale six weeks before the sale day was premature, irregular, and not warranted by the statute. By this irregular and unwarranted proceeding, the tax collector could not impose the damages on the taxpayer.

5. The statute clearly contemplates that the advertisement of the sale shall be made and appear during the three weeks preceding the sale day. Three weeks' notice is expressly pro-

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vided, and this cannot mean an insertion for three weeks beginning six weeks before the sale, with a period of three weeks intervening, during which there would be no publication of the notice of sale. Such has never been the custom in selling lands for taxes.

Upon each and all of these grounds, the decision of the chancellor, refusing to dissolve the injunction, should be affirmed. *Railroad Co. v. Love*, 69 Miss., 109; *Wynne v. Railroad Co.*, 45 Miss., 569; *Anderson v. Hawks*, 70 Miss., 643.

Argued orally by *Frank Johnston*, for appellee.

COOPER, C. J., delivered the opinion of the court.

In *Anderson v. Hawks*, 70 Miss., 639, we held that the ten per centum on taxes collected by the tax collector after December 15, allowed by § 2021 of the code, was not in the nature of a penalty, but was allowed as compensation for additional services to be performed by the collector, and that when no action had been taken by the collector to coerce payment of the taxes, he was not entitled to recover the per centum, although the taxes were not tendered by the taxpayer until after December 15, the day named in the statute. The present appeal rests upon different facts. The appellee remitted to the collector a certified check for the amount of its taxes, which came to his hands on January 14. This check the collector refused to accept in payment of the taxes, because it was not money, and because, also, it placed the funds at a point at which he did not desire a deposit. The check was remailed to appellee on the day of its reception by the collector. By the first available means of communication the appellee sent to the collector the proper amount in money, which was tendered to him by the agent of the appellee at 6 o'clock P.M. on the sixteenth of January. The collector then refused to accept the taxes unless the additional ten per centum thereon was paid.

On the thirteenth of January the collector, through his em-

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ployes, began to prepare the list of lands which were delinquent for taxes. The list was completed on the fifteenth and a copy thereof handed to the editor of the county paper for insertion in the next issue, and by 4 o'clock on the evening of the sixteenth proof was struck off and handed to the collector. The paper was issued some time in the evening of that day. On the morning of the sixteenth (before 9 o'clock) the collector posted on the door of the courthouse a list of the delinquent lands. Upon the refusal of the collector to accept the tender of the sum due for taxes on the sixteenth of January, the appellee filed its bill, paying into court the amount of the taxes, and procured an injunction restraining the collector from making sale of the lands for the ten per centum claimed by him as additional compensation. On final hearing, the amount paid into court by the appellee, together with the sum of \$50 for printer's fees and \$63 the advertising fee found by the court to be due to the collector, was directed to be received by him in full satisfaction of all demands against the complainant, and the injunction was thereupon made perpetual. From this decree the collector appeals.

By our statutes it is made the duty of all persons to pay the taxes assessed against themselves or their property on or before the fifteenth day of December (code, § 3801), and after that day it is made the duty of collectors to collect all taxes by distress and sale of personal property (code, § 3802). Section 3811 of the code provides that "after the fifteenth day of January the tax collector shall advertise all land in his county on which the taxes have not been paid, or which is liable to sale for other taxes, for sale at the door of the courthouse of his county on the first Monday of March following. Such advertisement shall be inserted for three weeks in some newspaper published in the county, if there be one, and be put up at the courthouse door, and shall contain a list of the lands to be sold in numerical order as they are contained in the assessment roll."

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The appellee contends that the collector is not entitled to demand the additional compensation, for the reasons: (1) That he was advised by the remittance of the certified check that the appellee was in good faith endeavoring to pay its taxes, and should have allowed a sufficient time, after he had declined to receive the check, to enable appellee to remit to him the money; (2) that the law only requires publication of the delinquent lands to be made for three weeks, and the collector was therefore premature in making the publication on the sixteenth of January, and should not be permitted to claim that what he thus unnecessarily did was the discharge of official duty; (3) that the compensation was not earned, because no sale was in fact made.

If the collector was authorized by the law to advertise the land for sale, we are unable to see that the power was at all limited by the circumstances of the appellee. It may have been an ungracious and harsh insistence upon a legal advantage, and the advertisement may have been made at the very earliest permissible time, for the purpose of fixing upon the appellee liability for the additional sum, but the law cannot test the validity of individual action by the motives which impel the actor. A legal act having legal consequences only, is not rendered illegal by the fact that it is done with an avaricious or unworthy purpose. We do not so characterize the conduct of the officer. We only say that, conceding what the appellee avers to be true, we know no principle upon which the law would condemn the act. The appellee negligently omitted to pay its taxes until the period in which they might be paid was about to expire, and assuming, without any suggestion from the collector, that he would accept a check for the taxes, made its remittance in that form. That he was under no obligation to receive the check, the appellee admits. If this be true, as it unquestionably is, we fail to perceive what legal right of appellee was infringed by the officer in making advertisement of the lands at the earliest permissible time.

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We are also of opinion that what was done by the collector was within both the letter and spirit of the statute. After January 15, the collector was vested with discretion as to when the advertisement shall be made. On January 16, or on any other succeeding day, he might lawfully have proceeded with the publication; but the statute fixed the price which should be paid to the printer, and no additional sum could have been paid by reason of the publication being made for a longer period than that prescribed—three weeks. We cannot concur in the view that the additional compensation cannot be demanded by the officer unless the collection is made by an actual sale of the property. A collection by resorting to any of the plans named in the statute entitles the officer to the per centum, even though the proceeding is interrupted by payment of the taxes. The sum given by the statute cannot be apportioned, and a larger or smaller amount, in proportion to the work done, be awarded as on a *quantum meruit*; the collector is entitled to all or none. There is no point in the proceeding, once begun, at which it may be said that the right to the compensation has attached rather than at another. The compensation is given as a unit; it cannot be apportioned. It is given when the collection is made by distress or other proceeding provided by the law, and the proceeding is necessarily also to be viewed as a unit. Whether the collection is made by virtue of a proceeding, initiate or complete, it is by the proceeding it is made, and the right to the compensation exists, because, otherwise, whether it would be payable at all would depend upon the will of the delinquent taxpayer, rather than upon the letter of the law.

The decree is reversed, the injunction dissolved, and the bill dismissed.

Brief for appellant.

MARY McKEAN v. JOHN MATHEWS APPARATUS CO.

REPLEVIN. *Reservation of title. Failure of consideration. Admissibility of evidence.*

In replevin by the vendor in a contract containing a reservation of title until payment of the purchase money, the vendee or his assignee may defend by proving a failure of consideration, in that the subject of purchase, by reason of latent defects, did not come up to the representations made by the plaintiff at the time of sale, such proof being in legal contemplation the equivalent of payment. *Bloodworth v. Stevens*, 51 Miss., 475; *Bates v. Snider*, 59 Miss., 497; *Gabbert v. Wallace*, 66 Miss., 618; *Dreyfus v. Cage*, 62 Miss., 733, cited.

FROM the circuit court of Warren county.

HON. W. K. McLAURIN, Judge.

The opinion contains a sufficient statement of the case.

Booth & Anderson, for the appellant.

1. Where the action of replevin is really for the enforcement of a security, as in this case, the amount due is a proper subject of inquiry, and if the defendant has paid a part of the debt, the judgment should show the unpaid balance and provide that its payment should be a discharge of the judgment. *Bates v. Snider*, 59 Miss., 497; *Dreyfus v. Cage*, 62 Miss., 738; *Gabbert v. Wallace*, 66 Miss., 624. The reasoning applicable to a case where there has been a partial payment applies with equal force to one where there has been a breach of warranty or failure of consideration. By allowing the defendant to avail of the defense by way of recoupment, a multiplicity of suits is avoided. *Bloodworth v. Stevens*, 51 Miss., 475. Our statute, moreover, limits the plaintiff's recovery to his interest in the property. Code 1892, § 3726.

2. It was not necessary for the defendant to plead specially the failure of consideration she offered to show. The plea of

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“not guilty” was the proper plea, and under it any matters of defense, whether affirmative or negative, might be given in evidence. *Bennett v. Holloway*, 55 Miss., 213; code 1871, § 1532; code 1892, § 3725.

Dabney & McCabe, for the appellee.

Although the decisions of this court cited by opposing counsel, beginning with *Bates v. Snider*, 59 Miss., 497, are at variance with the doctrine that in replevin only the question of possession is involved, we do not criticise, but, on the contrary, approve them. They are correct, but we insist that the rule they announce should not be carried further. In none of them was any question raised save one of accounting—the ascertainment of the balance due on an indebtedness. To allow the defense relied on in the present case would be to put the plaintiff at the defendant's mercy, for the action being primarily a possessory one under the statute, in the absence of a special plea setting up the defense, the plaintiff would be wholly unprepared to meet it. In the cases cited the plaintiff would naturally come into court prepared to prove some indebtedness.

WHITFIELD, J., delivered the opinion of the court.

The record is exceedingly vague as to the character of sale made to Mrs. McKean. But interpreting the meager statement on this point, “admission of sale to Mrs. McKean by Hill & Loeshcher”—in itself ambiguous—in the light of other facts in the record, and the ground of objection made to the testimony offered by appellant to show failure of consideration, arising from fraud in concealing a latent defect in goods manufactured by appellee, and known to appellee, and to the manifest course of the trial in the court below, and to the argument of counsel here, it appears pretty clearly that Mrs. McKean was the assignee of such rights in the contract of sale to Hill & Loeshcher as Hill & Loeshcher had, and hence succeeded to the exact rights they had. The written contract contained an

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express warranty against latent defects. Mrs. McKean had notified appellee of the alleged latent defects, and that defense would be made against payment of the balance on that ground. The case, under our decisions, is one of conditional sale, the reservation of title in which is intended only as a security for the purchase price, and in which, if the property is recovered by the seller, "he must deal with the property sold as security, and with reference to the equitable rights of the purchaser." *Foundry Co. v. Pascagoula Ice Co.*, 72 Miss., 615; 18 South., 365, and authorities cited.

On the trial in the court below, the appellant offered to prove "that the property described in the declaration did not come up to the representations made by plaintiff at the time it was purchased by Hill & Loeshcher; that there were latent defects in it which materially impaired its value, and were such as could not be discovered by defendant at all; that, about three and a half years after the purchase was made, these defects were developed by a proper use of the machinery; that, after the plaster of Paris which had been put upon the generator wore down, it was discovered there were plugs in the casting of the generator, which were evidence of the fact either that the generator was a worn second-hand machine, or that there was a flaw in the generator material—the original material out of which it was made—and the result of which was to render the machine absolutely unfit for use, and that the true value of the generator, by reason of the defects, at the time of the purchase, was \$300 less than the amount agreed to be paid therefor; that plaintiff was promptly notified of this condition of the generator, and that she would not make further payments on the purchase price." Defendant objected to this on the ground that it was not competent to make such defense in an action of replevin, which objection was sustained, and the testimony excluded, appellee excepting. And this ruling of the court is the controlling point presented here.

In *Bates v. Snider*, 59 Miss., 497, it was ruled that, under

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our statute, the amount due is a proper subject of inquiry, and that the judgment should show the amount due, so that the defendant, by its payment, might free his property of the charge upon it. See, also, *Gabbert v. Wallace*, 66 Miss., 618, and *Dreyfus v. Cage*, 62 Miss., 733. Our statute (§ 3726, code 1892) provides that the plaintiff's recovery is limited to his "interest" in the property. The principle is that the defendant in an action of replevin, under our statute, may prove payment in part or whole, and so reduce or discharge the debt for which the property replevied is held, without the expense and delay of a cross action. *Bloodworth v. Stevens*, 51 Miss., 475, very clearly sets forth the principle. If payment in whole or in part may be shown in one mode, as in cash, we can see no sound reason for holding that what amounts to payment—failure of consideration in whole or in part, which is merely payment in another mode—may not also be shown. There is no maintainable distinction between the cases. And the same reasons of convenience, avoiding multiplicity of suits, costs, etc., obtain in the one case as in the other. We think the testimony should have been received.

Reversed and remanded.

A. J. WILLIAMS v. SHARKEY COUNTY.

ASSESSOR. *Fees of. Laws 1894, p. 28.*

The additional compensation, not exceeding ten cents for each individual assessed on the personal roll, may or may not be allowed, within the discretion of the board of supervisors.

FROM the circuit court of Sharkey county.

HON. PATRICK HENRY, Special Judge.

The plaintiff, Williams, was the assessor of Sharkey county, and made the assessments thereof in the years 1894 and 1895.

Opinion of the court.

He demanded for his official services, as additional compensation, under the act of February 7, 1894, ten cents for each individual assessed on the personal roll. The board of supervisors, claiming a discretion in the premises, only allowed one-half of the demand in 1894, and disallowed the whole of it in 1895. Thereupon, the plaintiff instituted this suit seeking to recover, on the idea that he was legally entitled to ten cents for each individual so assessed, and that the allowance thereof was not discretionary with the board of supervisors. The county demurred to the declaration, and the court below sustained the same, dismissing the suit. The plaintiff appealed.

R. L. McLaurin, for the appellant.

The appellant bases his right of action on the provision of the act of 1894 (Laws 1894, p. 28), which, in regard to the assessment of individuals, reads as follows, viz.: "And the board of supervisors in any county may, in addition, allow the assessor not exceeding ten cents for each individual assessed on the personal roll," etc. An examination of former statutes on the subject will show that the word "may" in this statute should be construed to mean "shall," and the judgment sustaining the demurrer should be reversed. But if it be held that a discretion is left to the board of supervisors in this matter, it is not of such nature as to prevent control by the courts. It is matter of public concern that public officials should receive due and sufficient compensation for their services, and when the law is permissive in the letter it should be construed to be directory in intention. The appropriation or allowance of this salary by the board of supervisors is not a judicial act, but is ministerial, and within the control of the courts.

H. J. McLaurin, for the appellee.

The reporter finds no brief for appellee on file.

WHITFIELD, J., delivered the opinion of the court.

Responding to the request of counsel to decide this case on

Opinion of the court.

the merits, without reference to the technical sufficiency of the declaration, we hold that it was in the discretion of the board of supervisors to allow or disallow the claim. "May" clearly means "may" in the act of 1894, page 28. A comparison of the statutes on the subject demonstrates this. Under § 463, code of 1880, the allowance of a sum of five cents, under this section, for assessing individuals, was committed to the discretion of the board, "may allow" being the language used. In 1884 (Laws, p. 17) "may" was stricken out and "shall" inserted. In 1890 (Laws, p. 35) it was provided that the "assessors . . . shall have and receive, in addition to the compensation now [then] allowed by law, five cents for each poll assessed in each year," etc. By the code of 1892, § 2017, it was provided that the board of supervisors "may allow the assessor five cents for each individual assessed on the personal roll" in addition to the five per centum on the amount of the state tax contained in his assessment, not to be less than \$250 nor more than \$1,000 in any year, the word "shall" being stricken out and the word "may" restored. In 1894 (Laws, p. 28) the word "may" is continued, the provision, so far as this question is concerned, being that the board "may allow the assessor not exceeding ten cents for each individual assessed on the personal roll, . . . provided no commission or other allowance shall be paid by the state for assessing poll taxes," etc. See, also, Laws of 1882, p. 82, and Laws of 1894, p. 15. The course of legislation on this subject thus makes it clear that as the law stood under the act of 1894, p. 28, ch. 33, whether any amount, and, if any, what amount, should be allowed the assessor for assessing individuals, was committed wholly to the discretion of the board of supervisors, whose determination was final.

Affirmed.

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STEPHEN DUNCAN v. BOARD OF LEVEE COMMISSIONERS.

EMINENT DOMAIN. *Damages. Land left outside a levee. Constitution 1890, § 238.*

On a condemnation of land for levee purposes, the owner is not entitled, under § 238, constitution 1890, to damages because a part of his land is left outside of the levee; but is entitled to damage caused by the levee itself, such as the obstruction of drainage on land so situate.

FROM the circuit court of Issaquena county.

HON. JOHN D. GILLAND, Judge.

The appellant, Duncan, was the owner of a plantation in Issaquena county. It was bounded on the west by the Mississippi river, and many years previous a levee had been constructed along, but some distance back from, the river which protected the land from overflow. The bank of the river was caving and the stream was approaching so near to this old levee as to endanger it. This condition of affairs caused the Board of Mississippi Levee Commissioners to determine that a new levee was necessary, and it proposed to build one, some distance to the east of the old levee, which would leave a part of Duncan's land outside, or west, of the new levee, and outside of its protection. The drainage of the land was to the east, away from the river. Some valuable houses were upon the land which would thus be placed between the old and the new levee. The levee commissioners, acting under the statute giving authority (Laws 1884, p. 163), instituted condemnation proceedings for the purpose of acquiring the right to construct the new levee on Duncan's land, and to ascertain the damages to be paid him. Commissioners were appointed in pursuance of law, who, having viewed the premises, made an award in which they gave Duncan damages, as follows: For land occupied by

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levee and barrow pits, \$1,069.20; for growing corn, \$11; fencing, \$116.20; land between levees, damaged by obstruction of drainage, \$456; sipe ditch, \$275.28; growing cotton, \$141.50. Total, \$2,069.18. Duncan was not satisfied with the award, under the law cited, and took proceedings in the circuit court, objecting to the same. He specified as objections:

1. That the damages allowed by the commissioners to the land between the levees, occasioned by the obstruction of drainage, was too small, and should have been \$2,280.

2. The sum allowed for fencing was but one-half what it should have been.

3. The commissioners refused to allow anything for the damage to buildings and improvements situate between the levees, occasioned by the obstruction of drainage, or for the cost of removing said buildings. They should have allowed \$3,300.

These objections were all controverted by the appellee.

On the trial of the case in the circuit court, evidence was offered showing that the land between the levees would, because of the obstruction of drainage, be covered with water for a large part of every year, and tending to maintain each of the objections to the award. The court below instructed the jury, at the request of the appellee, to allow no damages to the houses or the land thrown outside of the new levee, and refused instructions asked by Duncan authorizing such allowances. The jury found a verdict giving Duncan \$232.40, and this was for fencing alone. A judgment having been entered accordingly, and a motion for a new trial disallowed, Duncan appealed.

It will be noted that objection was not made to the allowance by the commissioners of \$1,069.20 for land occupied by new levee and barrow pits. While the record is silent upon the subject, it is presumed that this was paid.

Section 238 of the state constitution is as follows: "No property situated between the levee and the Mississippi river shall be taxed for levee purposes, nor shall damage be paid to

Brief for appellee.

any owner of land so situated because of its being left outside a levee.’’

W. S. Farish and Calhoon & Green, for appellant.

The court below placed too rigid an interpretation on section 238 of the constitution. The section must be construed in reference to section 17 of the same instrument, which provides that “private property shall not be taken or damaged for public use, except on due compensation being first made,” and, being against common right as set forth in section 17, the construction should be *stricti juris* in favor of private right.

Neither the cases of *Commissioners v. Harkleroads*, 62 Miss., 807, and *Richardson v. Levee Commissioners*, 68 Miss., 539, or section 238 of the constitution affect appellant’s claim in this case. He is not claiming damages to his property “because of its being left outside of a levee,” but his claim is that the new levee destroyed drainage and made a lake of his land by confining the rainwater. The land was protected before; it is ruined now.

Walter Sillers, for appellee.

Under section 238 of our state constitution, and the decisions of this court in *Commissioners v. Harkleroads*, 62 Miss., 807, and *Richardson v. Levee Commissioners*, 68 Miss., 539, the appellant has no just cause of complaint of the result in the circuit court. The appellee cannot rightfully be made to pay damages which result from the location of the old levee. Nor should it be held because in case of the particular public work under consideration some of the appellant’s land will be located between the old and the new levee. It would be an injustice to the people who pay burdensome taxes to be compelled to pay for land that the board is bound to abandon on account of caving banks.

Argued orally by *S. S. Calhoon*, for appellee.

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WHITFIELD, J., delivered the opinion of the court.

Section 238 of the constitution excludes compensation for damages accruing to land "because of its being left outside a levee"—that is, damages inflicted upon the land by the Mississippi river, the *vis major*, the public enemy. "Left outside a levee" presents the idea of defencelessness as against the ravages of the river—the land is "left outside," left unprotected by the levee. The complementary clause of the section exempts the owner from levee taxes. The idea, the thought, of § 238, is that as the land "left outside a levee," is to be without levee protection against the river, therefore, it shall not be taxed for levee purposes. All damages, therefore, which accrue to lands from the ravages of the river, because not protected against it by the levee, are not to be compensated for. But damages produced by independent causes, other than being left outside the levee, if in their nature allowable within the rules of law, are still recoverable. Take the case of land so situated—high at the river, with declination and drainage eastward—that the river rarely or never overflows it, and which yields annual crops of great value, yet such, also, in its topography, that were the levee built along its eastern base, rain water, which had theretofore been carried off through natural or artificial drains eastward, would be backed up over it, and destroy its crops. Manifestly this is not damage accruing because of the lands being left outside the levee, but because of the construction of the levee over lands of that situation and topographical character; damages caused, to put it otherwise, not because the lands were unprotected by the levee, but caused by the levee itself.

If the lands had been inside the levee and the declinations and drainage westward towards the levee, damages caused by the obstruction of such drainage would be recoverable, not because the lands were inside the levee, but because of such obstruction where and as it was produced. Whether inside or outside the levee, if the damage to the land is caused by the

Syllabus.

obstruction of proper drains, natural or artificial, which flow, by reason of the declination of the land, in the one case eastward to the levee, and in the other westward to the levee, it is in both cases damage accruing, not because the land is left to the ravages of the river, unprotected by a levee, but caused by the building of the levee itself where and as built, over land of that topographical surface. This case falls within these principles—the land draining to the levee—so far as the claim for damages caused by obstruction of drainage is concerned. Nothing should have been allowed for cost of removal of the buildings to the protected side of the levee, because that is made necessary by their being left outside the levee. They must be very speedily removed to save them from the river, and the cost of their removal, therefore, is directly due to the fact that they are left outside the levee. Cost of such removal in (as to this point) a substantially identical case, was denied in *Richardson v. Levee Commissioners*, 68 Miss., 539. For the error in the action of the court as to damages due to obstruction of drainage, the case is

Reversed and remanded.

STATE, USE, ETC., v. H. SPENGLER, SR., ET AL.

1. **BILLS OF EXCEPTIONS.** *General and special.*

Bills of exceptions are of two kinds; general bills, which are taken to the action of the court on a motion for a new trial, and by which the whole case, or so much thereof as is desired, can be brought into review; and special bills, by which one or more specific rulings of the trial court are presented for review.

2. **SAME.** *General bills. Formal exceptions. Code 1892, § 739.*

The formality of excepting to the action of the trial court in passing upon a motion for a new trial is dispensed with by statute. Code 1892, § 739.

74 Miss.—9

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e81	38
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d81	41

Brief for appellees.

3. *SAME. Authentication. When signature and certificate of judge unnecessary.*

Under the act of 1896 (Laws, p. 91), in cases where the evidence and proceedings are noted by an official stenographer, if the stenographer's notes be written out, and the parties, or their attorneys, agree, in writing, that the same is correct, such notes so written become part of the record without the approval or signature of the judge.

4. *EVIDENCE. Exclusion by the court.*

It is error to exclude all the plaintiff's evidence, on motion of defendant, if the testimony of any witness makes out, or tends to make out, the case.

5. *SAME. Motion to exclude reserved. No action by trial court.*

When the trial court reserves its decision on a motion to exclude a part of the testimony of one of plaintiff's witnesses, and afterwards excludes all the evidence offered in his behalf, the appellate court will not review the question so reserved.

6. *DRAMSHOP KEEPER. Suit on bond. Code 1892, § 1582.*

In a suit upon a dramshop keeper's bond, under § 1582, code 1892, it is not necessary for the plaintiff to prove his case beyond a reasonable doubt, but only with reasonable certainty.

FROM the circuit court first district of Hinds county.

HON. ROBERT POWELL, Judge.

On motion. The appellees moved the court to strike from the record the stenographer's notes, because the same were not authenticated by the judge of the court below, and because, as was claimed, there was no bill of exceptions. The facts involved in the motion, together with the state of the record, are shown by the opinion of the court.

Williamson & Potter, for the motion.

Our contention is, that under the act of 1896 a bill of exceptions is still necessary in order to bring the stenographer's notes before this court, and that, too, whether the notes, as such, be signed by the judge or agreed to be correct by the parties or their attorneys. The law of 1896 does not repeal

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the other code provisions as to bills of exceptions, but amends § 736. Sections 733, 734 and 735 (code 1892) remain in full force. The law of 1896 provides that "the preceding provisions (meaning §§ 733-735, code 1892) as to the time when bills of exceptions shall be presented and signed, shall not apply to cases in which the evidence and proceedings are noted down by the stenographer, which is equivalent to declaring that said sections shall apply except as to the time when bills shall be presented and signed. The code provisions and the act are harmonious under this view; otherwise they are not in accord.

The act of 1896, considered independently of the code sections (which, we think, however, should not be done) provides throughout for bills of exceptions. It speaks of bills of exceptions in cases in which the evidence and proceedings are noted down by a stenographer being sent by mail or express to the trial judge, etc., showing that it was not in contemplation to dispense with his signing bills of exceptions.

W. Calvin Wells opposed the motion.

The reporter finds no brief against the motion on file.

Argued orally by *W. H. Potter* and *C. M. Williamson*, for the motion; and by *W. Calvin Wells*, contra.

COOPER, C. J., delivered the opinion of the court, on the motion.

The cause stands upon a motion by the appellees to strike from the record a transcript of the stenographer's notes of the proceedings and evidence in the court below, because the same is not made a part of the record by a bill of exceptions signed by the trial judge. There is on the transcript of the stenographer's notes an agreement in writing subscribed by counsel of both parties that the notes are correct. The transcript consists of matter of record proper, and of the stenographer's

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notes. The notes have neither the caption nor conclusion of a bill of exceptions; the style of the cause is given, and then follows the statement that "the following is the testimony in this case," followed by the testimony of the witnesses, which is interspersed with the rulings of the court upon the evidence offered by the plaintiff, and concludes with the following statement: "The plaintiff rests. The defense here moves the court to exclude the evidence of the plaintiff, and the motion is sustained, and the plaintiff excepts." The plaintiff made a motion for a new trial, which was overruled. No general bill of exceptions was taken to the action of the court on this motion.

Bills of exceptions, under our practice, are of two kinds:

1. Special, where only a ruling of the court upon one specific subject is sought to be reviewed, and there may be numerous special bills in one case, or several special exceptions may be included in one bill, but such bills must be taken before the jury retires from the box. Code, § 735; *Lindsey v. Henderson*, 27 Miss., 504; *Jackson v. The State*, 56 Miss., 311.

2. General bills taken to the action of the court on a motion for a new trial, by which the whole case is brought into review, or so much thereof as the party making the motion may desire to bring to the attention of the court, and these bills may be taken during the term, or within ten days, or within sixty days (now ninety days, Acts of 1896, p. 91), if the judge, in his discretion, shall extend the time. Code, § 735.

Prior to the code of 1892, the statute governing the reservation of general bills of exceptions provided that "when a motion for a new trial shall be granted, or refused, either party may except to the decisions of the court, and may reduce to writing the reasons offered for said new trial, together with the substance of the evidence in the case, and also the decision of the court on said motion; and it shall be the duty of the judge before whom such motion is made, to allow and sign the same; and such bill of exceptions shall be a part of the record in the cause, and it may embrace the judgment and motion

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and other matters of record," etc. Under this statute, it was held that this court could not review the action of the lower court overruling a motion for a new trial, unless exception was taken thereto in the lower court. *Scott v. The State*, 31 Miss., 473; *Railroad Co. v. Chastine*, 54 Miss., 503; *Bourland v. Supervisors*, 60 Miss., 996.

These decisions rested upon the language of the statute, which conferred the right that either party "*may except to the decisions of the court, and may,*" etc., and it was therefore decided that unless he did except in the lower court he could not invoke the right to review the action of the court on the motion for a new trial. But in the codification of 1892 the italicized words were omitted from the statute for the manifest purpose of dispensing with the mere formality of "excepting" in order to obtain the benefit of the statute. The motion for a new trial and the judgment of the court thereon are matters of record, and need no bill of exceptions to make them such. *Puckett v. Graves*, 6 Smed. & M., 384; *Railroad Co. v. Allbritton*, 38 Miss., 242.

In *Railroad Co. v. Chastine*, 54 Miss., we held that, while in conformity with prior decisions we could not review the action of the court upon the motion for a new trial unless exceptions had been taken thereto in the trial court, we would yet look to the evidence as authenticated by the judge in such defective bill, to test the correctness of the rulings of the court on exceptions taken during the trial to the giving and refusing instructions and the admission of evidence. If the evidence in this cause has, therefore, been made a part of the record, since the motion for a new trial and the judgment thereon are, without a bill of exceptions, a part of the record, and since it is no longer required that formal exception shall be taken to the judgment of the court on the motion, we can perceive no reason why, if error thus appears on the record, it may not be corrected.

Before the adoption of the act of March 18, 1896 (Acts, p.

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91), the authentication of a bill of exceptions was by the signature of the presiding judge, or, if he refused to sign, by that of disinterested attorneys who had been present at the trial. But that act provided that the code provisions governing "as to the time when bills of exceptions shall be presented and signed, shall not apply to cases in which the evidence and proceedings are noted down by the stenographer," and proceeds to provide how bills of exceptions shall be prepared and authenticated in such cases. Among other provisions of this statute, it is declared that "if both parties to the suit, or their attorneys, shall enter upon the stenographer's notes a written agreement that the same, as originally filed, or as subsequently modified by agreement, are correct, such transcribed notes, so agreed on, shall become a part of the record in the case without the approval or signature of the trial judge. The stenographer's copy of the evidence and proceedings in any case, when certified and signed by him, and agreed upon by the parties, or approved and signed by the judge, as aforesaid, shall be a part of the bill of exceptions," etc.

It is contended by counsel for the appellee that the act of 1896 withdraws the operation of the code provisions only as to the time in which bills of exceptions shall be prepared in those cases in which the evidence and proceedings are noted by the stenographer. But this contention gives effect to only a small part of the act, and disregards other unambiguous and important provisions. For although the act begins as though its sole purpose was to extend the time in which bills should be prepared in the states of case referred to, it is greatly expanded as it proceeds, and unquestionably makes the agreed notes a part of the record without any approval of the presiding judge. But counsel argues that the act does not, *eo nomine*, make such notes a bill of exceptions, but, on the contrary, declares that they shall be "a part of the bill of exceptions," thus implying that they can perform no function unless they are incorporated into and become a part of a regular bill. But a bill of excep-

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tions is nothing more than a written memorial, authenticated according to law, by means of which extraneous matters are brought into and made a part of the record. The statute declares that the stenographer's notes agreed to be correct by counsel shall thereby become a part of the record, and, also, that the same shall constitute "a part of the bill of exceptions." Counsel argue that the provision that the notes shall be a part of the bill of exceptions implies that they cannot be the whole bill; that if they do not constitute the bill of exceptions they are not a part of the record, and thus, by refined reasoning, bring one clause of the act to stand in palpable conflict with another. What is meant by the words "shall constitute a part of the bill of exceptions," is that when matters other than the proceedings noted by the stenographer, are desired to be incorporated into the record, these only need be authenticated by the judge, and, when this is done, the agreed stenographer's notes, made part of the record by the statute, may be looked to as a part of the bill. But when the stenographer's notes contain all that is desired to be incorporated into the record, and show, as in the case before us, the rulings of the court, the matters ruled upon, and the exception of the party, they constitute, in the very nature of things, a bill of exceptions, and, being a part of the record, may be used as such.

The motion is denied.

On the merits:

This was a suit upon a dramshop keeper's bond, under § 1582, code 1892, brought by the state for the use of Hinds county, on the information of Mrs. Mollie Guiney. The declaration charged that the principals in the bond were duly licensed to keep the dramshop and sold liquors to Hugh S. Guiney, the informer's husband, and that the husband was a person in the habit of becoming intoxicated, etc. During the progress of the trial defendants moved the court to exclude from the jury a part of the testimony of one of the witnesses, and the court reserved its decision on the motion. When the

Brief for appellant.

plaintiff rested the case, the defendants, the court not having acted upon the question reserved, moved the exclusion of all the evidence, and this last motion the court below sustained, and the judgment was for defendants. The plaintiff appealed.

W. Calvin Wells, for appellant.

In the case of *Rightor v. Beaumont*, 67 Miss., 285, this court says, "A motion to exclude all the evidence of a party should be sustained only where it is clearly and unmistakably insufficient to sustain the issue," and in the case of *Chicago, etc., Railroad Co. v. Doyle*, 60 Miss., 977, this court uses this language: "When the facts are disputed, or the just inferences from disputed facts are doubtful, depending upon the general knowledge and experience of men, it is the judgment and experience of the jury, and not of the judge, which is to be appealed to;" and, in the case of *Mississippi, etc., Packet Co. v. Edwards*, 62 Miss., 534, this court announces that "the power to exclude should be cautiously exercised." A motion to exclude all the testimony ought not to be sustained if a demurrer to the evidence would not be, for the two, so far as sustaining them is concerned, are governed by the same principles of law, and the same rules govern as to the giving of a peremptory charge.

In the case of *Mobile, etc., Railroad Co. v. McArthur*, 43 Miss., 180, this court discusses fully the question as to when a demurrer to the evidence should be sustained. The court there says: "The party demurring is bound to admit as true not only all the facts found by the evidence introduced by the other party, but also all the facts which that evidence may fairly tend to prove." See, as approving this rule, *Jordan v. Foxworth*, 48 Miss., 608, and *Western, etc., Co. v. Mayer*, 64 Miss., 797.

In reference to a peremptory instruction, in *Tribbette v. Illinois, etc., Railroad Co.*, 71 Miss., 227, this court says: "The peremptory charge was not erroneous if there was no evidence

Brief for appellees.

to warrant a verdict for the plaintiff in any view of it which might be taken. . . . If there was no evidence reasonably tending to establish plaintiff's contention, the peremptory charge was correct. . . . If there was such evidence, then the charge was incorrect." And, in *Holmes v. Simon*, 71 Miss., 245, the court says: "It is only where a verdict could not be permitted to stand that a peremptory instruction can be given. . . . It will not do for the judge to take the case from the jury and decide it himself because he thinks it should be decided that way." See, also, *Richardson v. Tolliver*, 71 Miss., 966; *Nesbitt v. Greenville*, 69 Miss., 22; *Cantrel v. Railway Co.*, 69 Miss., 438; *Lowenstein v. Powell*, 68 Miss., 73.

An application of these authorities and the principle announced to the evidence in this cause, will demonstrate that the judgment should be reversed.

Williamson & Potter, for appellees.

The court below correctly excluded all of the plaintiff's evidence, because all of it which proved, or tended to prove, a sale of liquor by the principals in the bond to Mr. Guiney, except the testimony of the informer herself, clearly and unquestionably related to sales before June 5, 1894, the date of the execution of the bond. If Mrs. Guiney's testimony did not entitle the case to be passed upon by the jury, there can be no question but that the judgment appealed from should be affirmed.

We proceed therefore to consider the testimony of this lady. There certainly can be no recovery in this case without proof of a sale to Mr. Guiney, after the execution of the bond, and it is a failure by the informer to give evidence of this indispensable fact to her case, which condemns it. The only part of her testimony on the subject of a sale is to this effect, and we put it as strong for her as the record will justify. Guiney left home one night drunk, the wife followed him, having a little boy to accompany her; when she came near the dramshop

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of Spengler & Muller, she saw her husband come out of the place; she then sent the boy into the shop to request Muller to come out. The boy went in, and Henry Muller, not the proprietor, but a clerk, returned with him. Upon his approach, Mrs. Guiney said to him: "You have sold whisky to Mr. Guiney," to which the clerk replied: "Yes, ma'am." This is the whole of it. Now, we contend that this was incompetent to prove a sale, and, further, if it be held admissible at all, it was insufficient in law upon which to predicate a verdict for the plaintiff. It was not a part of the *res gestæ*, for it was a narrative of a past event; it was not an admission of a principal, but a mere declaration of an agent not then acting for his principals. *Mayes v. State*, 64 Miss., 333; *Kramer v. State*, 61 Miss., 558; *Meek v. Perry*, 36 Miss., 359; *Dickerson v. Williams*, 50 Miss., 500; *Moore v. Railway Co.*, 59 Miss., 243; *McGowan v. Railway Co.*, 62 Miss., 682; *Forsee v. Railway Co.*, 63 Miss., 66.

And, again, the pretended sale of which, it is claimed, the informer gave testimony, was not specified or mentioned in the bill of particulars which was required under § 705, code 1892. The statute under which the suit was brought is a highly penal one, and this ought to have its influence in reaching a conclusion on the questions presented by this record.

Argued orally on the merits by *W. Calvin Wells*, for appellant, and by *W. H. Potter* and *C. M. Williamson*, for appellees.

WOODS, J., delivered the opinion of the court on the merits.

Regard being paid to the evidence of the plaintiff alone, and giving it, taken all together, such weight as it was fairly entitled to, did it make out, or tend to make out, the case of the plaintiff? And could and should a court permit a verdict for plaintiff on that evidence to stand? We are clearly of opinion that both of these questions must be answered affirmatively, and so answering, we must declare the action of the court in excluding all the evidence of the plaintiff to be erroneous.

Opinion of the court.

The evidence of Hugh Guiney himself—evidently a not willing witness for plaintiff—on his examination in chief, was sufficient to establish the sale of the liquor, as complained of by plaintiff (and this is the only fact over which any serious controversy appears in the transcript), and whether his evidence in chief, or that brought out on cross-examination, was true, should have been submitted to the jury. But there was other evidence supporting the plaintiff's contention on this point. The evidence of the witnesses, Black, McGowan, Hanna, and Cox, leaves no reasonable doubt in the candid mind that Mr. Guiney was a frequenter and patron of the saloon of Spengler & Muller. When to this is added the somber light of the harrowing evidence of the unhappy wife, the conviction that the husband did buy liquor as charged in the complaint, is much strengthened. That the husband came from the saloon of defendants in a state of intoxication, and with a bottle of whisky obtained at that saloon the very night before the despairing wife followed him up town, and saw him come out of this saloon, and was told by young Muller that he had just sold him liquor, is wholly undisputed. These facts, with the perfectly legitimate conclusions to be drawn from them, would, in our opinion, uphold a verdict for plaintiff. It must be remembered that the case was not required to be made out beyond reasonable doubt, but only with reasonable certainty.

For the present, we do not pass upon the competency of young Muller's statement made to Mrs. Guiney. The learned court below did not exclude this statement, on defendant's motion, because of its incompetency, and we are not called upon to decide what was not ruled upon below. The court below excluded all the plaintiff's evidence because of its insufficiency, and this we hold was error.

Reversed and remanded.

Statement of the case.

WILL KNIGHT v. THE STATE.

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73	348

CRIMINAL LAW. *Instruction Reasonable doubt.*

A reasonable doubt of guilt may arise from the want of evidence as to some fact having a natural connection with the case.

FROM the circuit court of Washington county.

HON. F. A. MONTGOMERY, Judge.

Will Knight, described in the evidence as a "yellow man," was indicted and convicted of grand larceny and sentenced to the penitentiary for a term of two years, from which conviction and sentence he has appealed. The property alleged to have been stolen was a horse, the property of Joseph Carter. It appeared from the evidence that Carter, on February 24, 1896, rode the animal up to a friend's cornhouse and hitched him to one of the puncheons. This was between seven and eight o'clock in the evening. Leaving the horse, the reverend gentleman called at the cottage of a friend near by, and there remained until between one and two o'clock the next morning. When the call was ended, the animal was not found where he had been hitched the evening before, and, so far as the record shows, it does not appear conclusively that he has ever been found anywhere else. The evidence against Knight on his trial for stealing the horse was entirely circumstantial, and the identity of the property stolen with that shown to have been in the possession of the accused was not established beyond controversy. When the state rested its case, the accused moved the court to exclude the whole of its evidence, but his motion was overruled. The court below was asked, when all the evidence on both sides had been heard, to give the following instruction in defendant's behalf, viz.:

Opinion of the court.

“The court instructs the jury that when the state undertakes to prove larceny by evidence that shows the recent possession of the property or the asportation thereof only, it is incumbent upon the state to prove the identity of the property in connection with the accused beyond every reasonable doubt or they must acquit.”

This the court did not give as asked, but modified the same by inserting the words “arising from the evidence” after the word “doubt,” where the caret appears, and gave the same as thus modified.

J. H. Wynn, for appellant.

The verdict is unsupported by evidence, and should have been set aside. A reasonably careful consideration of the testimony will satisfy the court of this, and I feel confident that this court will not allow a citizen to be deprived of his liberty upon such flimsy proof. The court erred in modifying the first instruction asked by the defendant, so as to require the reasonable doubt to arise out of the evidence, for in *Hale v. State*, 72 Miss., 150, it is said a reasonable doubt may arise from the want of evidence. The instruction, as originally asked, was unquestionably correct.

Wiley N. Nash, attorney-general, for the state.

The law was fairly submitted to the jury, and the case at bar is one peculiarly fitted to be passed upon by such a body. It was for the jury to say which witness, or which set of witnesses, they would believe. Will Knight was at the house the night the horse was missing, and when Carter found his horse, Will Knight was missing.

WHITFIELD, J., delivered the opinion of the court.

The first instruction asked by appellant should have been given as asked. The modification was specially harmful in a case like this, where the defendant relied very strongly upon

Syllabus.

the want of evidence connecting him with the offense. In the elaborate and learned note of Mr. Freeman to *Burt v. State*, 48 Am. St. R., 570, s.c., 72 Miss., 408, it is said: "So it is error to limit a reasonable doubt to something which is suggested by, or arises from, or springs out of, the evidence adduced, as this gives too narrow a definition of reasonable doubt. Such a doubt may arise from a want of evidence as to some fact having a natural connection with the cause. It has reference to that uncertain condition of mind which may remain after considering what has not been proved, as well as what has. *Wright v. State*, 69 Ind., 163 (35 Am. R., 212); *Densmore v. State*, 67 Ind., 306 (33 Am. R., 96). This is in conformity with our holding in *Hall v. State*, 72 Miss., 150. But, beside this, reluctant as we are to disturb the finding of a jury, we think justice requires us to say, in this case, that, on this evidence, the conviction should not be allowed to stand. The verdict is manifestly wrong on the facts.

Reversed.

J. F. POWELL v. T. C. SMITH.

1. EMPLOYE'S LIEN. *Agricultural products. Purchaser. Notice. Code 1892, § 2682.*

The lien of an employe, given by § 2682. code 1892, may be enforced against a purchaser of agricultural products, whether he buys with or without notice.

2. SAME. *Employe's consent. Burden of proof.*

In an action by an employe against a purchaser of crops, the burden of proof is not on the plaintiff to show that he did not consent to the sale. (*Warren v. Jones*, 70 Miss., 202, explained.)

3. SAME. *Overseer or manager.*

An overseer or manager of a farm, who aids by his labor to make, gather, or prepare for sale or market a crop, has a lien thereon for his wages.

Statement of the case.

4. SAME. *Waiver. Note for wages.*

The taking of a promissory note for such wages is not necessarily a waiver of the lien; the question of waiver is one of fact, and the intention of the employe in taking the note may be the subject of evidence, but a direct agreement is not necessary to a waiver.

5. EVIDENCE. *Writings. Effect on collateral fact. Province of judge.*

To interpret the meaning of a writing unaffected by parol testimony is the province of the judge; but its effect as evidence of a collateral fact—as waiver—is for the jury.

6. LANDLORD'S LIEN. *Code 1892, §§ 2495, 1183, 2682.*

The statutory lien on crops given a landlord by § 2495, code 1892, and those given employers and employes by § 2682, code 1892, are co-extensive and reciprocal.

7. STATUTES. *Construction. Argument ab inconvenienti.*

The inconveniences that would result from construing a statute according to its terms cannot be considered as an aid to construction, when its terms are too plain to admit of doubt.

FROM the circuit court of Yazoo county.

HON. ROBERT POWELL, Judge.

T. C. Smith sued J. F. Powell in the circuit court, averring in the declaration that he, the plaintiff, was employed for the year 1892 as overseer and manager of a plantation in Yazoo county called "Gandercleugh," by one Wilson, the owner, and aided by his labor to make, gather, and prepare for sale one hundred bales of cotton thereon in said year; that a balance of \$500 was due him by Wilson for his wages; that defendant, Powell, had, without plaintiff's consent, obtained possession of twenty-five bales of the cotton under a deed of trust thereon given him by Wilson, and had converted the same to his own use; that the cotton was worth \$25 per bale, and the declaration prayed for a judgment against defendant for the sum due plaintiff from Wilson. A demurrer to the declaration was overruled in the court below, and the defendant then filed a general traverse of its allegations, and the case was tried on the issue thus made.

Statement of the case.

On the trial before the jury the plaintiff proved substantially the facts stated in the declaration, but it further appeared that the defendant received all of the cotton raised on the plantation in 1892, most of it having been shipped to him by Wilson. About twenty bales were so shipped for Wilson by the plaintiff himself. Plaintiff knew of all the shipments, but was unadvised as to the state of accounts between Wilson and the defendant; plaintiff was not asked to consent, nor did he object, to the shipments. Wilson having failed to pay plaintiff, suggested to him a proceeding against the cotton. Plaintiff then consulted a lawyer, and was advised that the defendant had the superior right to the cotton. Being so advised, plaintiff accepted Wilson's note for the \$500 balance, payable out of the crop of the following year, 1893.

On cross-examination, the plaintiff testified that the note was received in payment of the sum due him from Wilson. On his re-examination, he was asked by his counsel, "What agreement, if any, did you have with Wilson at the time the note was taken relating to your lien upon the cotton?" To this he replied that it was agreed that he did not, by taking the note, release his lien, if he had any, on the cotton.

The plaintiff having rested his case, the defendant moved to exclude all of the evidence, but the motion was overruled. Defendant came upon the stand as a witness, and, in the course of his examination he was asked by plaintiff if he did not receive the proceeds of the cotton, and he testified that the cotton came to his hands as a factor, and that it was sold for Wilson and credited to his account.

The assignments of error, which are mentioned in the opinion of the court by numbers, were predicated of the rulings of the court in permitting, over defendant's objections, the introduction of testimony showing the agreement between the plaintiff and Wilson that the taking of the note should not be a waiver of the lien on the cotton, in refusing to exclude all of plaintiff's

Brief for appellant.

evidence, and in permitting plaintiff to prove by defendant that he had received the proceeds of the cotton.

The second instruction given for the plaintiff was in these words: "The court instructs the jury, for the plaintiff, that the mere taking of a note for the balance due him by Wilson will not release any lien that Smith might have on any cotton raised on the Ganderleugh plantation during the year 1892, but that, in order to release said lien, there must have been a direct agreement to that effect."

A verdict and judgment were rendered in the court below for the plaintiff, and defendant appealed.

Campbell & George, for appellant.

The demurrer to the declaration ought to have been sustained. To give a right of action to the plaintiff in this cause against defendant, a factor who sold the cotton for Wilson, would be to extend such right to a large class of persons who are equally, with the plaintiff, within the statute, whose claims would be hard to ascertain, and whose secret liens will tend to reduce the price of our chief crop and be exceedingly detrimental both to the agricultural and mercantile interest of the state. The statute itself nowhere intimates a right of action against one who either purchases the cotton, or who, as a broker or factor, sells the same in open market for the account of the owner. It provides a simple and easy mode of enforcing the lien—the cotton can be followed wherever found and subjected to the payment of the lien. Plaintiff had no right of property in the cotton, but a mere claim on it which did not entitle him to bring an action of trover for it. *Westmoreland v. Wooten*, 51 Miss., 825. While the declaration is styled "trespass on the case," it is really in trover against Powell for the seizure and conversion of the cotton, and it is nowhere charged in it that defendant had notice of the lien claimed by plaintiff. The lien given employees by the statute is *pari passu* in its nature with a judgment lien, and it is decided that a judgment creditor,

Brief for appellant.

having a judgment lien, cannot recover the value of property converted. *Dozier v. Lewis*, 27 Miss., 679.

In considering the evil consequences of allowing a suit like this to be maintained, it must be remembered that if employes can maintain such a suit, they can do so as long as their debts exist, and none of them would be barred in less than three years.

We think that Campbell, J., announced the true rule in *Wooten v. Gwin*, 56 Miss., 422, where he says: "Where a lien is given by law, and a remedy to enforce it, this remedy is exclusive, and if the holder of the lien permits the products to get beyond his reach, that he must bear the consequences of his want of vigilance or own negligence." We do not so argue with the expectation that this court will reverse the several decisions to the contrary in reference to the landlord's lien; the doctrine of *stare decisis* would in all probability prevent; but we do insist that the difficulties which have been encountered in landlord's lien cases, in the decisions of this court, ought to serve as warnings to prevent the extension of the doctrine to employe's liens, a much more numerous class, and fraught with even greater dangers.

The court erred in permitting the plaintiff to testify as to his intentions in taking the note not to waive a lien on the cotton. The question as to whether the taking of the note was a waiver of the lien, was one for the court to decide from the instrument itself. The note recited that it was to be paid out of the crop of 1893. *Parberry v. Johnson*, 51 Miss., 291; *West v. Platt*, 127 Mass., 372; 28 Am. & Eng. Enc. L., 528, note 4, and authorities cited.

The second instruction was clearly wrong in this, that it announces that a lien cannot be released except by a direct agreement. This is so palpable as to need no extended argument; the mere statement condemns it.

The court erred in not instructing the jury, as requested by defendant, that the burden of proof was on the plaintiff to

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show that he did not consent to the delivery of the cotton to appellant. *Warren v. Jones*, 70 Miss., 202.

John S. Perrin, for appellee.

This suit was brought on the theory that the lien given by the law to an employe upon the crops which he assisted by his labor to make, gather, and prepare for sale or market, was similar, as regards the rights and remedies of the employe, to the lien given to the landlord for rent and supplies. Upon demurrer to the declaration, the court below sustained this view of the law. The first question which arises, and which goes to the foundation of the suit, is whether this view of the court below is correct. An examination of the statutes giving the respective liens to the landlord and to the employe, together with the decisions of this court upon the statutes, will leave no room for doubt upon this subject. If analogy counts for aught, and reasoning therefrom is recognized, then there ought not to be any difficulty in arriving at what this court has established as the law applicable to this and similar cases, for but one conclusion can be arrived at—a conclusion so plain that “he who runs may read.” But if we are to go into the field of speculation, as counsel for appellant would have us to do, and theorize upon effects which have never been produced, it is more than probable that we will be involved in “a sea of doubt.” Let us look at the statutes provided in each case. They are found in chapters 72 and 75, of the code of 1892.

There are many points of similarity between them. Both are statutory liens; each in derogation of the common law; landlord and employe are specially favored by the lawmakers. By the same penal statute, it is made as much a crime to remove the property on which the employe has a lien as it is to remove that upon which the landlord’s lien exists. Code of 1892, § 1183. The landlord is protected by his paramount lien, not only from an attempt on the part of his tenants to defraud him, but is also protected from the world—even from the laborer,

Brief for appellee.

where the latter contracts with some other than the landlord himself. The employe's lien is equally as broad, and specially so where his contract is made with the owner of the soil. Almost the same words are used in the two statutes, but if there is any difference with regard to their latitude, it is in favor of the employe. In the landlord's case, these words are used: "Shall be paramount to all other liens, claims, or demands made upon such products." In the employe's lien, these are the words used: "Shall be paramount to all liens and incumbrances or rights of any kind, created by or against the person so contracting for such assistance, except," etc. Neither lien is required to be recorded or evidenced by any writing. In each case, the statute itself furnishes notice to the world of the existence of the lien. There is scarcely a right or a remedy which is conferred on the landlord by the statute providing for his lien and its enforcement, which is not given to the employe by his lien. Both liens are assignable, and the assignee under each has the same rights and remedies which the assignor had. Indeed, without being identical, it is hardly possible to conceive of two statutes which are more similar in their effect, intent, and extent. Such being the case with regard to the two statutes, why should a different rule prevail in protecting the beneficiaries under them? The question is unanswerable. Let us look, then, at the adjudications of this court respecting them. With regard to the landlord's lien, this court has held, in *Elson v. Johnson*, 69 Miss., 371, that the doctrine of *caveat emptor* prevails. In the landlord's lien, nothing is said about the lease being recorded, or as to how it shall be evidenced. In the employe's lien, it is specially provided that said liens "shall exist by virtue of the relations of the parties as employer and employe, and without any writing, or, if in writing, without recording." If, then, in the case of the landlord's lien, where the statute is silent as to how the lease between the landlord and the tenant shall be evidenced, and which is silent as to the necessity of recording the same, if in writing, the doctrine

Brief for appellee.

of *caveat emptor* prevails, with how much more force should the same rule be applied in the employe's lien, of which the statute specially says that the lien shall exist by virtue of the relationship of the parties as employer and employe? Looking at the statutes themselves, it would not be unreasonable for a third party to presume that where the landlord's lien is concerned, one ought to have some sort of notice, either by record or written contract, but the most casual observer could not but see that with the employe's lien no notice of any sort was necessary.

But it is objected that the enforcement of the law in favor of the employe, in the same manner and to the same extent as is done in the case of the landlord, would seriously interfere with the sale and commercial value of the agricultural products which are notoriously produced in this state, and, to this extent, would be against public policy. I deny that such would be the case. Experience has shown that since the enactment of this law in 1872, our agricultural products are sold as readily as before. The objection is based on the ground that every employer is dishonest—a most monstrous proposition. A little investigation will show that most, if not all, of these cases arise, not from the dishonesty of the employer, but from the rapacity and greed of the merchant or other party, who has the employer bound with “hooks of steel,” by means of a mortgage or other security, the very parties the lien was intended to protect the employe against. The reasoning of counsel for appellant applies with equal force to the very remedy which they contend ought to have been pursued in this case. But, grant that it is true, and a complete answer to the same is the trite phrase, “*Ita lex scripta est*,” and that this court can only expound the law as it is, and cannot refuse to enforce it because, possibly, its effect might be injurious. As is often said with regard to our penal statutes, the best way to get rid of a bad law is for the courts to enforce it strictly. Again, the tendency of modern legislation is to protect employes, to secure to them the

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fruit of their labor and to enlarge their civil rights. The divine declaration that the "laborer is worthy of his hire," has not only been engrafted in the law, but the law goes further, and says that no one shall prevent his receiving the same. Judicial interpretation of the law has gone equally as far. *Buck v. Payne*, 50 Miss., 652; *Ib.*, 52 Miss., 271; *Henry v. Davis*, 60 Miss., 212; *Fitzgerald v. Fowlkes*, 60 Miss., 270; *Cohn v. Smith*, 64 Miss., 816; *Newman v. Bank*, 66 Miss., 323; *Eason v. Johnson*, 69 Miss., 371; *Warren v. Jones*, 70 Miss., 202.

Argued orally by *T. H. Campbell*, for the appellant, and by *J. S. Perrin*, for the appellee.

WHITFIELD, J., delivered the opinion of the court.

The demurrer was properly overruled. This court has held that the landlord may recover the value of agricultural products on which he has the statutory lien, whether the purchaser thereof in open market has notice or not. *Eason v. Johnson*, 69 Miss., 371; *Newman v. Bank*, 66 Miss., 323. It follows, inescapably, that the same rule must be applied to the lien of the employe or other person "aiding by his labor to make, gather or prepare for sale or market any crop," etc., and that this lien must be co-extensive and reciprocal with the lien of the landlord. The statute (§ 1183, code 1892) makes the removal of products subject to the lien, whether of the employe or employer, a crime, and the same crime, punishable alike. The language of § 2682, defining the lien of the employe, is: "Such liens shall be paramount to all liens and incumbrances or rights of any kind created by or against the person so contracting for such assistance, except the lessor of the land . . . for rent or supplies;" and that of § 2495, defining the landlord's lien, is: "This lien shall be paramount to all other liens, claims or demands upon such products." If there be any difference as to the extent of the two liens, it

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would seem that the employe's is the broader. Both are creatures of the statute, neither requiring record, but the statute charging, of itself, all the world with notice of the existence of the lien. Both are assignable, and the assignee under each has the same rights as the assignor had. *Kerr v. Moore*, 54 Miss., 286; *Taylor v. Nelson*, 54 Miss., 524; *Newman v. Bank*, 66 Miss., 323. Section 2683 provides that the employe's lien "shall exist by virtue of the relation of the parties, and without any writing," or record, if written.

In *Buck v. Payne*, 52 Miss., 271, it was said that "the policy of the statute is to make sure to the laborer his wages," and, in *Irwin v. Miller*, 72 Miss., at page 177, that "the primary and principal purpose of this section [2682] is to afford security to agricultural laborers," in which case the benefit of the lien was extended to a ginner. In view of the fact that our people are mainly agriculturists, and of this unbroken course of legislation and decision, it is impossible to hold that the lien of the employe or other person does not have equal scope with that of the landlord. The inconveniences, real or supposed, to flow from this—the argument *ab inconvenienti*—whatever aiding force they may furnish the construction of statutes of doubtful meaning, can have none at all where the statute is clear and positive. If there be considerations which outweigh the present declared "policy of the statute," in favor of a change to a different one, these are to be addressed to the legislature. We have given the very able and learned argument of counsel for appellant on this branch of the case full consideration, and cannot concur in their view, under our statutes and decisions.

It was proper to permit the plaintiff to explain whether he meant, by taking the note, to waive his lien, under the circumstances of this case. As was said by Gibson, C. J., in *Reynolds v. Richards*, 14 Pa. St., 208: "It follows not that because the evidence was written its effect was to be determined by the court. To interpret the meaning of a writing unaffected by

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parol testimony is doubtless the province of the judge," but its effect as evidence of a collateral fact—as waiver, in this case—is for the jury.

The fourth and fifth assignments of error are therefore not well taken. Nor do we think the sixth or seventh assignment well taken. The question of waiver was one of fact for the jury. All testimony illustrative of this intent to waive should be received. And, for this reason, the court should have permitted the testimony that cotton had been shipped to New Orleans with the consent of plaintiff, if such testimony could be made. Waiver is the intentional relinquishment of a known right. 28 Am. & Eng. Enc. L., 526. See, especially, *Montague's Admr. v. Massey*, 76 Va., 307, and *Boynton v. Braley*, 54 Vt., 92. Counsel for both appellant and appellee misconceive *Warren v. Jones*, 70 Miss., 202. It is not the law that the burden of proof is on the plaintiff to show that the cotton was sold or delivered without his consent. The instruction in that case, announcing that proposition, was given below to the party who won, and who could not assign error of it, and what was said in the opinion had no reference to that charge.

Instruction No. 2, given for plaintiff, is at least misleading. If it was meant to announce the rule that, where a promise is accepted in satisfaction and discharge of a former promise, the latter promise must be accepted expressly in discharge of such first promise—in other words, that, under the modification of the ancient rule that a good accord and satisfaction was only made out where there was performance shown, by which modification the latter promise may be sufficient without performance, when, and only when, the latter promise is expressly accepted in satisfaction of the former, it is as to this sound. See *Whitney v. Cook*, 53 Miss., 559, and *Pulliam v. Taylor*, 50 Miss., 551. But, under the wording of the instruction, the jury may have understood that the lien could only be waived in any case by a direct and express agreement. This would be error. Under the peculiar facts of this case, it is impossible to

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say that this instruction did not mislead the jury. We find no other error. For the error indicated, the judgment is

Reversed, and cause remanded.

JOHN HART v. LUCY GARDNER.

1. DEED. *Life estate.* "Convey and warrant." Code 1892, § 2479.

Under § 2479, code 1892, the words "convey and warrant" are effective "to transfer all the right, title, claim and possession" of the grantor only when an intention to convey a less estate is not expressed in the deed.

2. SAME. *Construction.*

The proper end of all rules of construction is to effect the intention of the parties to the instrument, and this is true of deeds as well as of other writings.

FROM the circuit court of Hinds county, first district.

HON. ROBERT POWELL, Judge.

This was an action of ejectment for land in the city of Jackson. The case was tried by the court, a jury being waived, and was submitted upon an agreed state of facts. The agreement was as follows: "Lucy Gardner was the owner of the property described in the declaration August 14, 1895, and on that day she executed and delivered to Alex Williams the following deed: 'In consideration of the sum of ten dollars cash, receipt of which is acknowledged, and the further consideration that A. Williams is to furnish me with food and clothing for the balance of my natural life, and to pay all taxes, both state and county and city, upon the property conveyed, I hereby convey and warrant to the said A. Williams the property described as follows: [Describing the property sued for.] It being hereby understood that possession of said property is to be given at my death. Should said Williams fail to supply me with wholesome food, and plain but suitable clothing, then

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82	281
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192	176

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this deed to be void; otherwise, to remain in full force and effect.' The deed was duly acknowledged and recorded. After the filing and recording of said deed, a judgment was duly rendered in a justice of the peace court against Lucy Gardner, upon which an execution was issued and levy made on the land in controversy as the property of Lucy Gardner, and under that execution and levy said property was duly advertised and sold, the purchase money paid, and a proper deed made to the purchaser at said sale, which had been duly recorded. Afterwards, the purchaser executed and delivered a deed to said property to John Hart, for \$100. Lucy Gardner is still alive, and Williams has paid her the ten dollars, and has otherwise complied with the conditions of his contract.'" There was a judgment in the court below for the defendant, and plaintiff appealed.

Williamson & Potter, for appellant.

The question in the case is the construction of the deed from Lucy Gardner to Alex Williams. Appellant contends that, under his deed, he is entitled to the possession of the lot during the lifetime of Lucy Gardner, and this question the court decided against him, from which judgment he appeals.

By the plain terms of the deed, possession of the property was withheld from Williams until the death of Lucy Gardner. To put the case in its strongest light, suppose Alex Williams had brought the action in ejectment against Lucy Gardner, could he have maintained his suit? The recital in the deed under which he claims, that "possession of said property is to be given at my death," answers the question in the negative. Appellee, in the circuit court, relied upon the decision in *Robinson v. Payne*, 58 Miss., 692, in which the court held that the habendum clause could not convert an estate in fee simple, passed by the granting part of a deed, into a lesser estate. The rule was there called for and applied, because the deed expressed two repugnant intentions; the one or the other had to

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give way, and the court held that it was a proper case for the application of a fixed rule of construction. But the court there says that rules of construction must give way where the deed shows the clear intention of the parties, and that "the intention must prevail whether it be discovered in the first or the last clause of the instrument." The deed here under consideration is an informal one, and it has no habendum clause. "The reservation by a grantor of the use and control of the granted premises during his life, creates in him a life estate, with all its incidents." 1 Washburn on Real Property, 122. And this estate is subject to sale under execution. 7 Am. & Eng. Enc. L., 127; code 1890, § 3498.

Calhoon & Green, for appellee.

The question is, what estate, if any, vendible under execution, did Lucy Gardner have in the land? The deed is in form a statutory one, so far as its grant, estate and warranty are concerned. Code 1892, § 2479. Under § 2479, "convey and warrant" have the statutory effect "to transfer all the right, title, claim, and possession of the person making it as can be done by any sort of conveyance." Hence, by the use of the word convey, the statute imported into the conveyance the words "all the right, title, claim, and possession" of the grantor. Thus, by the granting clause of the deed, in legal effect, was granted all the elements of title—right of property, right of possession and possession. And the use of the statutory word, "warrant," under code 1892, § 2480, operated, in legal effect, as a full covenant of warranty, whereby was expressed that the possession of the vendee would be maintained against all the world, including the true owner. *Green v. Irving*, 54 Miss., 450. Such being the necessary legal effect of the words "convey and warrant," used in the granting clause of the deed, it was incompetent for the grantor, by a subsequent clause, to deny that the granting clause vested the right of possession and possession in Williams, and to reserve

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a life estate. The manifest result of the two expressions is to produce repugnancy between the granting clause and the subsequent clause. If the subsequent clause is given effect, that is, if by it possession is reserved during the life of the grantor, thus, in effect, creating and reserving a life estate in the grantor, it is clearly repugnant to the grant of the entire estate by the granting clause. It is a grant of "all the right, title, claim, and possession" by the granting clause, and a limitation by way of reservation, whereby the grantor reserves a life estate. Elphinstone's Interpretation of Deeds, pp. 217, 218, thus states the rule: "Rule 66: If both the premises and the habendum contain different express limitations of the estate, the limitation in the habendum will, if possible, be considered as explanatory of that in the premises, but if the limitations are repugnant, they will be construed in the manner most beneficial to the grantee." "The habendum may extend, but not abridge, the estate limited in the premises." Washburn on Real Property, 390, states the rule to be: "If the language of the grant be definite in limiting the estate, and that of the habendum is clearly repugnant to the grant, the habendum yields to the terms of the grant."

In *Robinson v. Payne*, 58 Miss., 708, this precise question was decided. There, by the granting clause, an estate in fee was, by the use of apt words, granted to Mrs. Robinson, and by the habendum it was provided that she should have a life estate. The court held that there was a clear repugnance, saying: "This seems plainly an attempt to convert the absolute fee conveyed by the granting clause into a life estate by the habendum, which cannot be done. From the earliest times the decisions are uniform that, where there is a clear and manifest repugnance between the premise and the habendum clauses of the deed, the former must prevail."

WHITFIELD, J., delivered the opinion of the court.

The only question presented by this record is whether the

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grantor in the deed reserved a life estate. It is argued that because the use of the words "convey and warrant" has, under § 2479, code 1892, the effect, where the form of deed provided by that section is used, "to transfer all the right, title, claim, and possession of the person making it as can be done by any sort of conveyance," the use of these words in a deed containing other clauses clearly expressing the actual intent of the grantor is to have the same effect, notwithstanding such clearly expressed actual intent. The argument is that the law implies from the use of these words a grant of all the grantor's estate; and hence, these words occurring in the granting clause, the legal implication from their use is conclusive that the grantor intended to grant all the estate he had, and if, in the habendum, a different actual intent is expressed, the habendum is in conflict with the granting clause, and must be disregarded. The fault in this reasoning is that the rule has no application when the estate intended to be granted is not actually set forth in the granting clause, in words chosen by the grantor for that purpose, but is worked out by legal implication of the intent to convey a particular estate from the use of certain statutory words, and where, in addition, the estate intended to be granted is clearly shown elsewhere in the deed. The rule which required the habendum to yield to the granting clause when repugnant intents are expressed in the two as to the estate to be conveyed, is applicable only where these intents are both the actual intents of the grantor, and not intents arising by implication of law from the use of certain words to which the statute has affixed a certain meaning. The distinction is between the actual intent of the grantor, expressed in terms of his own, selected to declare that intent, and an intent merely implied by law. And this distinction is abundantly sustained by authority.

In *Elph. Interp. Deeds*, p. 216, rule 65, it is said: "If no estate be mentioned in the premises, the grantee will take nothing under that part of the deed except by implication and presumption of law. But, if an habendum follow, the intention

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of the parties as to the estate to be conveyed will be found in the habendum, and consequently no implication or presumption of law can be made."

In *Montgomery v. Sturdivant*, 41 Cal., 290, where the statute provided, as does ours (code 1892, § 2435), that a fee simple should pass without the use of words of inheritance unless a less estate was limited, and the granting clause conveyed a certain tract of land to "Z. Montgomery and Ellen, his wife," habendum to them for their natural lives, remainder to the heirs of their bodies, and the rule was invoked to show a fee in Montgomery and his wife, the court said (page 296): "If the habendum were entirely omitted, the deed in question would undoubtedly have conveyed an estate in fee simple, and it is therefore contended that the language of the habendum which attempts to limit the estate granted to a life estate is repugnant. Independently of the statute, the common law rule was that a deed like this, without the habendum, would convey a life estate only. The estate, though different, was just as definite as that under the rule of the statute. If the argument of counsel were correct, the result would have been that the grant could not have been enlarged by the habendum. Yet we all know that, where the formal parts of a deed are all used, this was the customary mode of conveying, and is still often followed. The rule of common law was only intended to apply to conveyances in which the extent of ownership of the grantee in the thing granted was not defined in the conveyance. The statute rule was merely intended to take the place of the common law rule. Neither was intended to override the expressed intention of the parties. The office of the habendum is to limit and define the estate which the grantee is to have in the property granted. It is not an essential part of a deed. No estate is limited in the granting part of the deed, but this is done in the habendum. The legislature did not intend to prohibit this form of conveyance, but merely to supply a rule of construction when the parties fail to define the estate conveyed."

Opinion of the court.

In *Stukeley v. Butler*, Hob., 305, it is said: "Like law is of the use of an habendum, that if, by your premises, you have given no certain nor express estate than that otherwise the law would give, you may alter and abridge—nay, you may utterly frustrate—it by the habendum." To the same effect, see 3 Washb. Real Prop., p. 466 *et seq.*, especially section 61; Martind. Conv., sec. 111; 1 Devl. Deeds, secs. 216, 213, 214. And see, specially, the very striking case of *Henderson v. Mack*, 82 Ky., 379, where the court say: "The proper end of all rules of construction is to effect the intention of the parties to the instrument; and the intention of the grantor in a deed is to govern, when it can be ascertained, equally as in the case of other instruments. In arriving at it the entire paper must be considered. Blackstone says that the construction 'must be made upon the entire deed, and not entirely upon disjointed parts of it.'" If clauses are repugnant to each other, they must be reconciled if possible; and the intent, and not the words, is the principal thing to be regarded. "The technical rules of construction are not to be resorted to when the meaning of the party is plain and obvious." As was well said in *Robinson v. Payne*, 58 Miss., 692, "the intention must prevail, whether it is discovered in the first or the last clause of the instrument." See, also, note to *Dodge v. Railroad Co.* (Mass.), 13 Law. Rep. Ann., 318, 319. This deed does not stop with the statutory form. The words "convey and warrant" are not left to have the meaning and effect which they would have had had the statutory form alone been used, namely, to convey all the estate, right, title and possession of the grantor. The grantor does clearly express, in terms of her own choosing, her actual intent, to wit, that possession is not to be delivered till her death. She reserved a life estate. In such case, the words "convey and warrant," which pass all the grantor's estate by virtue of legal implication alone, where the statutory form of conveyance is used, must yield to the actual intent, thus elsewhere in the deed plainly declared, just as the words

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“grant, bargain and sell” operate as an express covenant that the grantor was seized, etc. (see § 2440, code 1892), only where not “limited by express words contained in the conveyance.” The grantor does not leave it to legal implication; she clearly defines and declares the estate she means Williams to have. Williams is to pay all taxes, state, county and city, during the term of the life estate. He is not to furnish lodging, because she retains possession till death. He is to clothe and feed her, and at her death, in return for these considerations, he is to have the property. There really is no habendum clause in this deed, unless we regard the explanatory clause, “it being hereby understood that possession of said property is to be given at my death,” as being such a clause. Plainly, on this deed, Lucy Gardner reserved to herself a life estate for her life, and this passed under the execution sale to appellant. Code 1892, § 3498. It follows that

The judgment must be reversed, and a judgment entered here for appellant.

MADISON COUNTY v. JAMES L. STEWART.

1. STATUTES. Code 1892. Laws 1884, p. 318.

The act of 1884, p. 318, a special law authorizing the working of public roads in Madison county under contract, was not repealed by the code of 1892.

2. SAME. Repeals by implication.

The repeal of statutes by implication is not favored, and when the earlier statute is particular, and the later general, and contains no negative words, the prior statute is not repealed, unless the repugnance is so great as to show clearly a legislative purpose to that effect.

FROM the circuit court of Madison county.

HON. ROBERT POWELL, Judge.

The facts of the case are stated in the opinion.

74 160
79 222

74 160
82 140

74 160
187 206

Brief for appellee.

J. B. Chrisman, for appellant.

The repugnancy of the general law for working public roads, under code 1892, to the special law for Madison county (Laws 1884, p. 318) is conspicuous. The two laws are irreconcilable. The special law was not saved from repeal by § 8 of the code. The chapter of the code on the subject of roads, ferries and bridges went into effect in July, 1892, and § 8 did not go into effect until November 1 afterwards (code 1892, § 12). Section 8, therefore, did not become the law until five months after the repugnancy between the new and old law had, under settled rules of construction, operated to repeal the old, and of course the section could in no sense revive the repealed special law or give it validity.

W. H. Powell, for appellee.

Manifestly, chapter 320, acts of 1884, is still in force. This chapter is entitled "An act in relation to public roads in the county of Madison, and for other purposes," while chapter 117 of code of 1892 is entitled "Roads, ferries and bridges."

Private and local laws are not affected by § 8 of the code of 1892. The Madison county law is a local one, and is not revised or brought forward as such into the code. The code is the general law, and governs only in those counties that have no local law. Read the act of 1884 with the code, and the same result will be reached as in the Bolivar county case. *Jones v. Melchoir*, 71 Miss., 115. Repeals by implication are not favored. 23 Am. & Eng. Enc. L., 489, all of section D.

Both the act of 1884 and the code of 1892 can stand without detriment. There is nothing so repugnant in them as to compel the court to abrogate either. One was for a particular purpose, and the other for general purposes. When §§ 2, 3 and 8 of the code of 1892 are considered with reference to the act of 1884, page 318, *et seq.*, it is manifest that the act of 1884 is still the law for Madison county.

Opinion of the court.

COOPER, C. J., delivered the opinion of the court.

Stewart brought suit against the county of Madison, to recover the sum of \$150 for working the public roads of said county. The case was tried on an agreed state of facts, from which it appears that in December, 1895, the board of supervisors of Madison county, believing that an act of the legislature, approved February 16, 1884 (Acts 1884, p. 318), was then of full force and effect, made a contract with the plaintiff to work certain roads in said county under the provisions of said act. It is agreed that the work was done in accordance with the terms of the contract, and that the sum demanded by the plaintiff is justly due to him if the said act was not repealed by the code of 1892, before the contract between the plaintiff and said board was made, the only question being whether said act was in force and unrepealed when the contract was entered into. By the act approved February 16, 1884, the board of supervisors of Madison county was authorized to "provide for the construction, repair, and working of the public roads, bridges, and turnpikes in said county, or any district or part thereof, by contract, such contracts to be for not less than one nor more than five years; such contracts may be let privately or publicly," etc. In 1892 the laws of the state were codified, and among other provisions of the code is one authorizing the boards of supervisors of the counties in the state to make contracts for the working of public roads, in their respective counties, by contracts, but no contract to be for less than two years, and each road or division to be under a separate contract, and the contracts were to be let as other contracts by boards of supervisors. Code, § 3929. By another section of the code, it is declared that all contracts, where the sum contracted to be paid shall exceed \$50, shall be let at public outcry, or upon sealed bids, after publication. *Id.*, § 340. There are other differences between the provisions of the act of February 16, 1884, and those of the code relative to the mode of levying taxes, etc., to obtain funds to pay for road work under the

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contracts; but they need not be set forth, for, unless the act is repealed by the repugnancy between it and the code provisions above noted, there is nothing in the other code provisions which would produce that result. The introductory chapter of the code contains an express provision (§ 8) that "private and local laws not revised and brought into this annotated code, are not affected by its adoption, unless it be expressly so provided herein." But this chapter became operative only on November 1, 1892, when the body of the code went into effect, while the chapters on "Boards of Supervisors," of which § 340 is a part, and that on "Roads, Ferries and Bridges," which contains § 3929, were, by a special chapter, put in operation from May 1, 1892.

The argument is that the provisions of these chapters are inconsistent with those of the act of February 16, 1884, and repealed them by implication on May 1, 1892, and that the saving of the introductory chapter does not avail, because that chapter came into operation only on November 1, 1892, six months after the repeal by necessary implication of the act of 1884. The appellant, therefore, contends that the board of supervisors had no authority to enter into the contract with the plaintiff; not under the act of 1884, because that had been repealed, and not under the code, because the contract was not made in conformity to the code provisions. We are of opinion that, regardless of the saving provision of the code (§ 8), the local act of 1884 was not repealed by the code. That act was of local operation only. It provided a complete and detailed scheme having reference to the highways in one county, while the code provisions applied equally to all the counties in the state. The repeal of statutes by implication is not assumed to have been within the contemplation of the lawmakers, and, when one statute is particular and the later one general, and especially where the later statute contains no negative words, the rule of construction is well settled that the prior statute is not thereby repealed unless the repugnancy be so great as to

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show clearly the legislative purpose to that effect. "The reason of this rule is that, when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such construction in order that its words shall have any meaning at all." Sedg. St. Const., 98. Section 340 of the code of 1892 is substantially § 2179 of the code of 1880, and as it appeared in the code of 1880, both it and the act of 1884 had operation—the code in the state at large, and the act in the particular county to which it applied. The code of 1892 brought the section forward from the code of 1880, and preserved it, with some modifications, as a part of the revised statutes; but neither in this nor in any of the other code provisions do we find anything indicating a purpose to repeal the local statute.

The judgment is affirmed.

RICHARD M. NELSON v. J. W. ABERNATHY.

1. TAX TITLES. *Invalid sale. Insufficient description.*

A tax collector's sale of land, not otherwise described than as "37 acres in the N. $\frac{1}{2}$ of Sec. 1, T. 13, R. 4," is void for uncertainty. *Stms v. Warren*, 67 Miss., 278, cited.

2. SAME. *Sale in subdivisions. Duty of collector. Code 1892, § 3813.*

A tax collector who sells a tract of land embracing several legal subdivisions of forty acres each, does not comply with § 3813, code 1892, by offering first one of said subdivisions and then each succeeding one as an independent subject of sale, until the amount due is produced, but should add each succeeding subdivision to the parcel or aggregate of the parcels already offered.

74	184
74	698
74	184
176	769
74	184
88	275

Statement of the case.

3. SAME. *Failure to designate subdivision offered. Void sale. Code 1892, § 3813.*

A tax sale of a tract of land containing several legal subdivisions of forty acres each, is void, when the collector, in offering the same for sale under § 3813, code 1892, fails to designate the several subdivisions by their proper descriptions. *Hodge v. Wilson*, 12 Smed. & M., 498.

4. SAME. *Curative statute. Ineffectual as to void sale. Code 1892, § 3817.*

A tax sale that is void by reason of the failure of the collector to designate the several forty-acre legal subdivisions composing the tract sold by their proper description at the time of offering the same, is not cured by the provision in § 3813, code 1892, that "no error in conducting the sale shall invalidate it," nor by § 3817 of the same code, to the effect that his conveyance shall not be invalidated, "except by proof that the land was not liable for the taxes or that the taxes for which the land was sold had been paid before sale" (*Virden v. Bowers, Ib.*, 26; *Griffin v. Ellis*, 63 Miss., 348) nor by the constitutional provision assimilating tax sales to sales under execution. *Gamble v. Witty*, 55 Miss., 36.

FROM the chancery court of the second district of Chickasaw county.

HON. BAXTER MCFARLAND, Chancellor.

The appellant filed his bill in equity for the cancellation of certain tax deeds as clouds upon his title, alleging as to thirty-seven acres of the land that the description by which it was sold and conveyed by the collector was void for uncertainty, and that, as to a certain other tract, the collector did not sell in the manner required by law, in that he offered the same for the taxes due thereon in forty-acre lots, and, finding that the first forty acres offered did not bring the amount of taxes due, then offered another forty-acre lot, separate and distinct from the first, and then another, separate and distinct from the second and first, and so on until one hundred and sixty acres were offered, and then offered the whole, failing to add the second forty to the first when offered and the third to the first and second, and so on, and offer the whole; and that said lands were not designated by the tax collector when the same were offered for sale, as, by law, should have been done.

Brief for appellant.

The defendant demurred to the bill, and, the court having sustained the demurrer and dismissed the bill, this appeal was prosecuted. The opinion sufficiently indicates the grounds of demurrer.

Stovall & Williams, for the appellant,

1. The action of the tax collector in offering each succeeding forty-acre lot after the first one, separate and distinct from those previously offered, was contrary to law. Code 1892, § 3813; *Hodge v. Wilson*, 12 Smed. & M., 498; *Vasser v. George*, 47 Miss., 713; *Griffin v. Ellis*, 63 *Ib.*, 348.

2. The collector's failure to designate the parcels when offered avoids the sale, and the same is not cured by the provisions of the statute to the effect that "no error in conducting the sale shall invalidate it" (§ 3813, code 1892), and that the collector's "conveyance shall not be invalidated in any court, except by proof that the land was not liable to sale for the taxes, or that the taxes for which the land was sold had been paid." Code 1892, § 3817; *Hodge v. Wilson*, *supra*; *Virden v. Bowers*, 55 Miss., 1; *Griffin v. Mixon*, 38 *Ib.*, 424; *Griffin v. Ellis*, 63 *Ib.*, 348; *McLeod v. Burkhalter*, 57 *Ib.*, 65.

3. The collector's deed to the land described as "37 acres in N. $\frac{1}{2}$ Sec. 1, T. 13, R. 4," was void, and the bill certainly should not have been dismissed as to that. *Sims v. Warren*, 67 Miss., 278; *Pearce v. Perkins*, 70 *Ib.*, 276.

Thomas J. Buchanan, on the same side.

1. The sale for taxes was invalid, because (1) the land was not sold in the manner required by law, each forty-acre tract being offered separately, and (2) no one of the forty-acre tracts was properly designated when offered for sale by the collector. *Hodge v. Wilson*, 12 Smed. & M., 505.

2. The appellee cannot rely on § 3813, code 1892, as curing the above fatal defects. It is true that section provides that no error in conducting the sale shall invalidate the same. But

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that section cannot be construed alone. It must be interpreted along with other provisions of the law governing sales for taxes, and cannot validate a sale void for a total failure to comply with the law. This question has been already adjudged. *Griffin v. Ellis*, 63 Miss., 351.

3. The description, "37½ acres in Sec. 1, T. 13, R. 4," expresses a patent ambiguity, and, as to that, the deed certainly should have been canceled as void.

Lacey & Stockett, for the appellees.

The case of *Griffin v. Ellis*, 63 Miss., 348, relied on by appellants, has no application to the present controversy. It was decided with reference to the law as it appeared in § 521, code 1880, which provided merely that "neither a failure to advertise nor error in an advertisement should invalidate a sale."

Section 3813, code 1892, under which the validity of the sale in this case must be determined, is much broader. It contains these additional words: "Nor error in conducting the sale shall invalidate." This change in the law was within the constitutional power of the legislature, which was subject to no restrictions in the matter of tax sales.

2. There is no provision in § 3813, code 1892, as there was in § 521, code 1880, that the collector, on failing to realize the amount due on the first forty-acre subdivision, should "add" another such subdivision, but only that he should "offer" another one. The word "add" cannot properly be interpolated in the present statute. The case of *Hodge v. Wilson*, 12 Smed. & M., 498, is not in point in view of the changes in the statute.

Argued orally by *T. J. Buchanan*, for appellee.

WHITFIELD, J., delivered the opinion of the court.

The description, "37 acres in the N. ¼ of Sec. 1, T. 13, R. 4," was void for uncertainty. *Sims v. Warren*, 67 Miss., 278; *Pearce v. Perkins*, 70 Miss., 276. As to the other lands, it is

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distinctly averred in the bill, and admitted by the demurrer, both that the sheriff offered first one forty-acre tract, and then another, disconnected from it, and so on, and then the whole of that tract, and did not add the second forty-acre tract to the first, and the third to the first two, and so on, and that, in offering each forty-acre tract, he failed entirely to designate or describe each such lot in any way whatever. In *Hodge v. Wilson*, 12 Smed. & M., 498, all the judges agreed that this last fact (the failure to designate and describe the tract offered) made the sale void. Section 3813 of the code of 1892, though not containing the word "add," appearing in § 521 of the code of 1880, is substantially identical with it; and under the one, as the other, the sheriff should add the first forty-acre lot to the second, and so on, so far as the manner of sale in this respect is concerned. We do not now hold, however, that the failure to do this would make the sale void. But we do hold that the failure to describe or designate in any way what forty acres the sheriff was offering does render the sale void. One who bids at a tax sale is entitled to know for what precisely he is bidding, and the owner is entitled to have his land so offered, by proper designation, that intending purchasers may be able to bid intelligently, and that the part thus properly sold may bring as much as possible. Section 3817 of the code of 1892 (see § 525 of the code of 1880, and § 1700 of the code of 1871) provided that "no such conveyance [tax deed] shall be invalidated in any court, except by proof that the land was not liable to sale for the taxes, or that the taxes for which the land was sold had been paid before sale." But this court, in *Griffin v. Ellis*, 63 Miss., 348, in construing this very statute, held a sale void because the collector sold the whole body of land without first having offered it in subdivisions, adding to each body an additional subdivision until the whole was exposed, and instanced many other things than the failure to pay the taxes before the sale, which were vital to the validity of the sale. And it is equally clear that the pro-

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vision in § 3813, code 1892, that no error in conducting the sale should invalidate it, does not have the effect to cure a total departure from the manner of selling prescribed by law—to make immaterial the things which are fundamentally vital to a valid sale. Failure to advertise, etc., may not be material, for the law fixes both time and place of sale. But the things omitted by the sheriff in making this sale are fundamental.

Nor does the well-known constitutional provision help the appellee. As was well said in *Gamble v. Witty*, 55 Miss., 36: “The constitutional provision cited cannot be successfully invoked to sanctify illegality, and cure a departure from the requirements of law in the important matter of imposing taxes.” And no more can it be invoked to cure the fatal errors in the manner of sale pointed out in this bill. The necessity that the manner of sale shall be legal, notwithstanding such statutes as § 3817 of the code of 1892, § 525 of the code of 1880, and § 1700 of the code of 1871, is clearly pointed out in Mr. Justice Campbell’s concurring opinion in *Virden v. Bowers*, 55 Miss., 26, where, in discussing § 1700 of the code of 1871, he says that the section simply meant that the tax collector’s conveyance should not be invalidated except by proof that the taxes had been paid before sale, where “there was a legal assessment, and a legal sale as to the time, place and manner of selling.” We think the manner of sale here was not merely irregular, but a total departure from the method the law has specifically and plainly declared. To give the statute the construction contended for by appellee, would sanction a tax sale at midnight.

The decree is reversed, and the cause remanded for an accounting as to the taxes paid by appellee, which appellant offered to pay.

Reversed, demurrer overruled and cause remanded.

Brief for appellant.

ILLINOIS CENTRAL RAILROAD Co. v. WILLIAM GUESS.

1. RAILROADS. *Engineer. Knowledge of defects, etc. Switches.*

An engineer who has knowledge of the incompetency of his fireman, and of defects in his engine, is thereby required to use greater care, in approaching stations with switches, to keep his train under control, to avoid accidents.

2. SAME. *Negligence. Contributory negligence.*

If, in approaching a station, an engineer fails to exercise ordinary prudence, and is injured because of such failure, he cannot recover of the company because of its negligence in not equipping the train with air brakes and the engine with a proper headlight, and in having an incompetent fireman in its service.

3. SAME. *Rules of company.*

The rule of the company, known to the engineer, that a switch signal imperfectly displayed, or the absence of a signal at its usual place, must be regarded as a danger signal, is binding on an engineer, and if he be injured because of a failure to observe the rule, he cannot recover from the company.

4. SAME. *Section 193, constitution of 1890; code 1892, § 3559, as amended (Laws 1896, p. 97).*

Engineers and conductors in charge of dangerous or unsafe cars or engines, voluntarily operated by them, are excepted from the rule (sec. 193, constitution, and § 3559, code 1892, as amended by act of 1896), that knowledge by an employe of the defective or unsafe character or condition of machinery or appliances, shall be no defense to an action for an injury caused thereby.

FROM the circuit court of Lafayette county.

HON. EUGENE JOHNSON, Judge.

The facts are stated in the opinion of the court.

Mayes & Harris, for appellant.

We rely for a reversal of the case upon the testimony of the plaintiff himself, who was the only witness introduced in his behalf on the trial of the cause, our contention being that, con-

Brief for appellant.

ceding that the fireman was incompetent, conceding that the engine did not have air brakes, and conceding that there were no lights at Pickens, still plaintiff shows by his own testimony that his injury was caused by his positive disobedience of a plain and well-established rule of the company in force at the time, and that by the observance of this known rule he could have avoided injury.

Further, we contend that the very facts of which the plaintiff complains as being negligent acts on the part of the company, were each and every one of them fully known to him at the time, and were additional reasons why he should have observed more particularly the rule, the disobedience of which by him caused his injury.

At the time of the accident plaintiff was on the lookout in order to shut off steam. He saw no light. He knew that the absence of a light was a danger signal, and meant to stop. He knew the rules of the company; was required to study them. He says: "I suppose if the light had been burning bright I could have seen it a quarter of a mile. If I could not see the light, if it was imperfect, I knew that the rules required me to stop." The track was perfectly straight for a mile and a quarter south of Pickens, and he saw no light. He did not stop, or try to stop; did not have his engine under control; took no sort of precaution until he was in one car's length, or thirty feet, of the end of the switch, at which time he saw that the switch staff was so turned as to display a red signal, which meant danger. We insist that public policy requires a strict observance of rules as to danger signals by engineers in charge of trains, and they cannot be excused for overlooking them.

For the plainest reasons we say the judgment of the court below should be reversed. We deem it unnecessary to cite authorities. The rule as to contributory negligence prevails in this state. That it does so prevail is announced at every term of this court, and where the facts plainly show the want of due care on the part of the persons complaining, this court uni-

Brief for appellee.

formly denies the right of recovery. *Vicksburg, etc., Railroad Co. v. McCowan*, 62 Miss., 682; *Buckner v. Railroad Co.*, 72 Miss., 873.

W. V. Sullivan, for appellee.

It is submitted in behalf of the appellee, that he had the right, on entering the service of the railroad company, to assume that the rules by which he was to be governed would be observed by the company itself. Rule 1092, page 57 of the record, directed that the company should have a track watchman, whose duty it was to see that the switches were set and locked. Now, the company either had such fireman or it did not. This is a question of fact. Appellee claimed that there was none, and testified to the fact that he had seen none, and made inquiry to ascertain if there was one, and learned that there was none.

Again, it is said that, under rule 891 and rule 771 of the company, it is the duty of the station agent to look after the sidings and furnish the lights. He is in a different department of service, reporting to a different superior, and he failed to discharge his duty, both in looking after the sidings and seeing that the switch was closed, and in seeing that the danger signal was displayed, and, in this event, the company was liable under the provision of the constitution, § 193. It will not do to say that the station agent was employed in the same labor, or department of labor, as the engineer, nor will it do to say that the track watchmen, or anyone engaged in the construction of the track, was in the same department of labor. Each reports to a separate department, as shown by the rules copied in the record.

Again, the appellee had the right to assume that this kind of a train, starting out for the purpose of making fast time, carrying perishable freight, was equipped in the proper manner to be handled safely. That was but a duty the company owed to him. One of the necessary equipments of the proper

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handling of such a train was air brakes, properly connected with the engine, which this train and engine did not have. The cars had the air brake provision, but the engine did not have the connecting pipes. Of this fact he was ignorant until he had left on the trip. In addition to this, it will be remembered that while he was required to handle twenty-nine cars on a fast schedule, only two brakemen were allowed him, which was manifestly insufficient to handle the twenty-nine cars without the assistance of air brakes. So it will not do to say that Guess should have stopped when he saw no light, and that its absence was, in itself, a danger signal, for the simple reason that he did not know, or could not know in the dark, exactly how near he was to Pickens. He had the right to rely upon the company's discharging its duty, and had the right to expect to see the light, either a white or red signal, and the company cannot plead its own default as contributory negligence on the part of the engineer.

It is submitted that the charges as asked and given for the plaintiff and the defendant fully and fairly presented the whole law as applicable to this case, and that the judgment should be affirmed.

Argued orally by *J. B. Harris*, for appellant, and by *W. V. Sullivan*, for appellee.

CALHOON, Sp. J., delivered the opinion of the court.

Mr. Guess sued the railroad company for damages for personal injuries, and the company pleaded the general issue, and gave notice of contributory negligence on his part. He recovered judgment, and the company appeals.

His own testimony is that he was an extra engineer of the company, and was called at Water Valley, at night, to make the round trip, with a train of freight cars, from that point to Canton and return. He ascertained that an incompetent fireman would be assigned him for the trip, and he objected, but

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was told that he had to take that fireman or be discharged. He ascertained that the engine assigned him had no air brakes, as it was customary to have on through freight trains, like the one he was put in charge of. He ascertained, also, that the engine had an insufficient headlight. He had to run by a printed time schedule, requiring him to go only six miles per hour through certain towns, but this rule is not enforced at Pickens station, where the accident occurred. He had orders to have his train under control at telegraph offices, and Pickens was not a night telegraph office. He took his train to Canton, and, on the return trip, with the same engine and fireman, he had twenty-nine cars to pull—a heavy banana train—which train being a through train, with perishable goods, he had few stops to make, and did not have to stop at Pickens.

He arrived, going north, at Vaughan's station late, and had only eighteen minutes to make Pickens, but he was thirty minutes in making it, on account of the incompetency of his fireman, which made it necessary for him to occasionally leave his post, and fire the engine himself. If the engine had been provided with air brakes, the train could have been stopped in a much shorter space than without them. There were only two brakemen allotted to his train. If he had had air brakes, he says he could have stopped the train before any damage was done, "especially to myself." The distance between Vaughan's and Pickens is seven miles.

When he got on the engine at Water Valley everything seemed to be all right, and he had hardly time to investigate before he was compelled to leave, but the headlight did very little good, it being so defective.

When he got to Pickens, on the return trip, he was going a little less than thirty miles per hour, and was running on passenger train time. It was a foggy morning, and in the night time when the accident occurred, and he could hardly see at all by the headlight. Just about the time he got in a car length of the switch at Pickens, going north, he saw the switch was

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wrong, blew for brakes and reversed his engine, but not in time, and it ran into the switch, jumped the track, and caused very serious injury to him.

There was no light at the switch, and no switchman at the station, and it was the duty of the company to have had both, the rules, with which he was familiar, being that a red light at a station, or the display of no light at all, meant danger, and required him to stop his train. He saw no light at Pickens, but the morning was too foggy for him to see it at the usual distance. The first intimation that he had of danger was when he saw the switch staff itself, about one car length from the open switch. He had vacated his seat in order to assist in firing, but had returned to his "lookout," and says he knew then he must have been right near Pickens. The track towards Pickens, from the south, is straight for one and one-half miles. He says he is familiar with the rule, No. 65, that a signal imperfectly displayed, or the absence of the signal at its usual place at the station, must be regarded as a danger signal.

Mr. Guess, when he started from Canton to Water Valley on the night of the accident, knew perfectly well the insufficiency of the headlight of his engine, and the absence of air brakes, and the incompetency of his fireman. This knowledge devolved upon him the duty to use the greater care in approaching stations with switches, to keep his train in hand to avoid accidents. Very manifestly he did not exercise ordinary prudence under the circumstances, developed by his own testimony. He knew that, in approaching the switch, it was his duty to look for the danger signal, and he knew that, if there was no light at all at such a place, it was his duty, under the rules of the company, to stop his train, and he so testified. It is immaterial how negligent the company was, so far as the facts of this case develop, because, with the exercise of ordinary prudence, there would have been no accident whatever.

Section 193 of the constitution, and also § 3559 of the code, brought forward in the amendment of March 11, 1896, ex-

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pressly except engineers and conductors in charge of dangerous or unsafe cars or engines, voluntarily operated by them, from the provision that knowledge by an injured employee of the defective or unsafe character or condition of machinery or appliances, shall be no defense to an action for injury caused thereby. This exception, applying to engineers and conductors, was manifestly incorporated on grounds of public policy for the protection of human life.

This court has announced that employees—not conductors or engineers—must use ordinary care to avoid injury. *Buckner v. Railroad Co.*, 72 Miss., 873. Mr. Guess, an engineer, manifestly did not use such care to avoid it, and notwithstanding our sympathy for his suffering, we are compelled to

Reverse and remand this case, and it is so ordered.

 ALABAMA & VICKSBURG RAILWAY CO. v. W. J. LIGON.

 1. RAILROADS. *Farm crossing. Necessary plantation road. Code 1892, § 3561.*

A road connecting the dwelling house and the pasture land of a farm, through which a railway track runs, is a necessary plantation road within the meaning of § 3561, code 1892, when its disuse would involve any considerable inconvenience or expense to the tenant in possession, and a failure of the railway company to maintain a crossing for such road subjects it to the penalty of the statute, although there may be another crossing within the inclosed and cultivated land on the opposite side of the farm.

 2. SAME. *Penalty for failure to maintain crossing. Recovery by tenant. Expiration of lease pending suit.*

The right of the lessee of a farm, as "the person interested," to recover of a railway company the penalty prescribed by § 3561, code 1892, for its failure, during his tenancy, to maintain a crossing for a necessary plantation road, is not impaired by the fact that, pending suit, he has ceased to have any interest in the premises, as tenant or otherwise.

Statement of the case.

FROM the circuit court of the first district of Hinds county.

HON. ROBERT POWELL, Judge.

This was a suit by Ligon to recover the statutory penalty of \$250 for the failure of the railway company to maintain a crossing for a necessary plantation road on a farm of which he was in possession under a lease for five years. The track of defendant ran through the farm, which was one of about three hundred acres, in an easterly and westerly direction, and divided the cultivated from the uncultivated land, nearly all of the former being on the north side of the track, where the residence was also situated. On the western side of the farm, and south of the track, was the pasture land of the farm. There was a crossing in the cultivated field, on the eastern side of the farm, and Ligon entered into an agreement with defendant to do the necessary grading and keep up bars if they would put in and maintain the crossing in question on the western side of the farm. The crossing was put in and maintained by the defendant for some time under this agreement. The bars that Ligon built were not in place one night, and several horses were killed at the crossing by appellant's train. Defendant then ran wires on both sides of the track, completely closing the crossing and shutting Ligon off from his pasture land, access to which had been his object in securing the crossing. After the crossing was put in by defendant, Ligon built another fence on his land, within a few feet of and parallel with his fence on the western boundary of the farm, thus making a lane to the crossing, without the use of which his stock could not reach the pasture land except by going through his cultivated lands. There was some evidence tending to show that the appellant was willing for Ligon to put in gates on both sides of the track, and it was shown, on behalf of defendant, that, pending the suit and before trial, Ligon's interest in the place as lessee had been sold under execution. Verdict and judgment for plaintiff, and appeal by defendant.

Opinion of the court.

Nugent & Mc Willie, for the appellant.

1. The legislature did not intend that the right to a farm crossing should be so unqualified as to admit of its encroachment on the right of a railway company to fence its track in the effort to prevent accidents and preserve life. Conceding that the crossing was one for a necessary plantation road, which is rather doubtful, the appellant could, with propriety, impose upon one who insisted on breaking the continuity of its fence, as a condition thereto, the duty of maintaining gates and keeping them closed. *Railroad Co. v. Williamson*, 29 N. E. Rep., 455; *Railroad Co. v. Cosper*, 22 Pac. Rep., 634; *Ib.*, 42 Kan., 561.

2. The statute, § 3561, code 1892, awards the penalty to the person interested, thereby clearly meaning the person interested at the time of trial and judgment. *Cooper v. Fox*, 67 Miss., 237; 6 Lawson's Rights and Remedies, p. 4650, sec. 2846.

Williamson & Potter, for the appellee.

Ligon was the person interested within the meaning of the statute. He was in possession of the farm as lessee under a five-year lease at the time of the injury. His right of action for the penalty accrued while he bore the relation of lessee to the property, and it was not diverted by the interruption of that relation. It was a demand that inured to him personally—a debt recoverable whether he continued to be interested in the farm or not. *Railroad Co. v. Spencer*, 72 Miss., 491; 5 Am. & Eng. Enc. L., 165; Sutherland on Stat. Con., 359, 360, 457.

WHITFIELD, J., delivered the opinion of the court.

The case chiefly relied on by counsel for appellant (*Railroad Co. v. Williamson*, Ind. App., 29 N. E., 455) has no application whatever. At page 460 the court says: "Buck did not own the land on the north side of the railroad, opposite the

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side track. The right of way did not separate his land into two parcels, and the gates were not put in for the purpose of enabling him to go from a tract of land on one side of the railroad to a tract on the other side." So of the other cases cited from Indiana. The doctrine of *Railroad Co. v. Spencer*, 72 Miss., 491, was thoroughly considered, and is reaffirmed. The appellee was entitled to the crossing. See the following authorities: *Thornt. R. R. Fences*, secs. 257, 267-269, 281, 283-286, 289, 291, 292; *Henderson v. Railroad Co.*, 48 Iowa, 216; *Gray v. Railroad Co.*, 37 Iowa, 119; *Railroad Co. v. Hughes*, 2 Ind. App., 68; *Ib.*, 28 N. E., 158. Appellee was interested. The right to the penalty accrued while he was in possession.

Affirmed.

VICKSBURG BANK v. WIRT ADAMS, STATE REVENUE AGENT.

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1. TAXATION. *Assessment. Misdescription. Parol evidence. Collateral attack.*

In the absence of fraud, a misdescription in a perfected and approved assessment cannot, in a collateral attack, be shown by parol.

2. SAME. *Incomplete, etc. Direct attack.*

Misdescription may be so shown if the assessment be incomplete and is undergoing direct adjudication.

3. SAME. *Banks. Privilege tax. Laws 1888, pp. 15, 16.*

Under the act of 1888 (Laws pp. 15, 16), the payment of a proper privilege tax exempted a bank from *ad valorem* taxes.

4. SAME. *Lists rendered by taxpayers. List made by assessor.*

The assessment is the list made by the assessor, and it is not constituted of the lists rendered him by the taxpayers.

5. SAME. *Judgments on appeals from assessments. Damages. Code 1892, § 4360.*

A judgment determining the liability of property to taxation and fixing its value, is not, on appeal to the supreme court, within § 4360, code 1892, imposing damages.

Statement of the case.

FROM the circuit court of Warren county.

HON. W. K. McLAURIN, Judge.

This suit had its origin in the effort of the state revenue agent to collect from the bank taxes due to the city of Vicksburg for the years 1886, 1887, 1888, and 1889, and which he claimed the bank had wrongfully escaped. Section 3, of chapter 34, laws of 1894, p. 29, under which the revenue agent acted, is in the following words, viz.: "After the expiration of the fiscal year in which taxes become due, should the revenue agent discover that any person, corporation, property, business, occupation, or calling has escaped taxation by reason of not being assessed, it shall be his duty to give notice to the tax collector in writing, and the collector shall, within ten days thereafter, make the proper assessment by way of an additional assessment on the roll or tax list in his hands, and give ten days' notice, in writing, to the person or corporation whose property is assessed, and all objections to such assessments shall be heard at the next meeting of the board of supervisors of counties, or board of mayor and aldermen of municipalities. The board of supervisors or mayor and aldermen shall also be notified in writing by the collector of said assessment, and the state revenue agent may appear at said meeting, and an appeal to the circuit court may be taken from the order of the board approving or disapproving such assessment by either party. If the assessment be approved, and no appeal be taken, and the taxes shall not be paid within thirty days thereafter, the property, if it be real estate, shall be ordered sold as provided by § 3850 of the annotated code of Mississippi, and if it be personalty, the tax collector shall proceed to collect by distress or otherwise. If the tax collector shall fail or refuse to make an assessment and report the same as herein required, he shall be liable on his bond for the amount of taxes properly collectible and ten per cent. damages thereon. If the assessment rolls be in the hands of the assessor at the time the revenue agent makes discovery of property which has escaped taxation,

Statement of the case.

he shall give the required notice to the assessor, who shall make the proper assessment and give the required notices to the owner of the property and to the board of supervisors or mayor and aldermen, under like penalties for failure as provided against the collector, and like proceedings shall be had. When any taxes shall be collected under assessments made as herein required, the revenue agent shall receive therefor, at the time of collection, the same compensation allowed him by law for other collections." Acting upon this statute, the state revenue agent gave the following notice to the city tax assessor and collector (the same person held both offices), viz.:

"NOTICE TO ASSESS.

"To the Assessor and Collector of the City of Vicksburg, Miss.:

"You will take notice, and you are hereby notified, that the following described property in your said county, to wit: Vicksburg Bank, belonging to and owned by E. S. Butts, president, and H. C. Kuykendall, vice president, *et al.*, has escaped taxation during the years of 1886, 1887, 1888, 1889, by reason of its not being assessed.

"You are, by virtue of an act of the legislature of the state of Mississippi, approved February 7, 1894, entitled 'An act to provide for the election of a state revenue agent, to prescribe his powers and duties, and to repeal §§ 4187, 4190, 4192, 4193, and 4195, ch. 126, annotated code of Mississippi,' now notified and required to, within ten days hereafter, make the proper assessment of said property by way of an additional assessment on the roll or tax list in your hands, and to give ten days' notice, in writing, to said E. S. Butts, president, *et al.*, whose property is so assessed, and also notify, in writing, the mayor and board of aldermen of the city of Vicksburg of said assessment.

"Herein fail not, under penalties imposed by said act.

"Witness my signature, this nineteenth day of May, 1894.

"WIRT ADAMS, *State Revenue Agent.*"

Statement of the case.

In pursuance of this notice, the city assessor and tax collector made the following assessment, viz.:

PERSONAL.

ADDITIONAL ASSESSMENT AS PER NOTICE OF WIRT ADAMS, REVENUE AGENT OF THE STATE OF MISSISSIPPI, FILED WITH ME MAY 19, 1894. SAID NOTICE HERETO ATTACHED ON OPPOSITE SIDE OF BOOK.

No.	NAME OF PERSON, CORPORATION, SOCIETIES, PARTNERSHIPS OR FIRMS TAXED.	Buildings and Improvements Separate from Lands.	Clocks, Watches, Jewelry, etc.	Gold and Silver Plate.	Wares and Merchandise.	Horses, Mules, Cattle, Sheep, and Hogs.	Vehicles of all Kinds.	Stocks or Bonds other than U. S.
	Vicksburg Bank for 1886....	.....	.....	.....	.....	\$75,000	.....	.....
	Vicksburg Bank for 1887....	.....	.....	.....	.....	75,000	.....	.....
	Vicksburg Bank for 1888....	.....	.....	.....	.....	75,000	.....	.....
	Vicksburg Bank for 1889....	.....	.....	.....	.....	75,000	.....	.....

And gave proper notices thereof, under the statute.

The matter was thus brought before the municipal authorities of the city of Vicksburg, where the bank objected to the additional assessment, specifying the following objections:

1. Said assessment was not made in a legal manner or by a person authorized by law to make it.

2. Said bank is not subject to be so assessed, or assessed at all, for any one or more of said years.

3. Said property has not escaped assessment or taxation for said years, is not liable to be assessed now, is not in existence, the money was not out at interest, the property was not loaned money, the valuation is excessive.

4. The law under which said assessment was made is unconstitutional and void. Acts of 1894, p. 29.

5. Said assessment is the act of the state revenue agent, and not the constitutional assessor.

6. Said assessment was made under and by virtue of the order and directions of the state revenue agent, and not by the assessor and tax collector voluntarily, as his official act within and from a sense of official duty, but under fear and threats produced and made by said revenue agent, that he would be

Statement of the case.

harassed by suits on his official bond if he refused; and did so also to avoid a possible liability on his said bond if he failed to obey the said orders of said state revenue agent; and said assessment was made without any knowledge on the part of the collector or assessor as to the facts on which it is based. Said revenue agent had no authority to give such notice to the assessor and collector before the end of the present fiscal year.

7. The passage of the act providing for the election of the state revenue agent (Acts of 1894, p. 29), was not in accordance with § 71 of the constitution of Mississippi, so far as it provides for the present incumbent holding said office, and so far as it provides for assessments to be made as therein enacted.

8. Said bank was assessed for the years 1886, 1887, on February 15, 1894, by said assessor and collector before notice from said revenue agent for him to so assess on said capital stock, and such assessment has been or will be returned with the general assessment of property for the year 1894 by said assessor and collector, and said bank paid the privilege tax, as provided for by law, for the years 1888 and 1889 in lieu of all the taxes.

9. The said notices are insufficient in law.

10. Said bank objects to said assessment as wholly unwarranted by the law or the facts, and upon other grounds, to be stated on the hearing.

The matter was heard by the municipal authorities, and the additional assessment was disapproved, and the state revenue agent appealed to the circuit court.

The defenses made in the circuit court by the bank were, that for the years 1886 and 1887 it had paid a privilege tax, and it had been assessed upon its capital stock and paid its taxes thereon before action by the revenue agent. The assessment shown for said years, and which the bank offered to introduce in evidence, was also an additional assessment, and it was made in 1894, and was as follows:

Statement of the case.

PERSONAL ROLL.

NAME OF PERSON, CORPORATION, SO- CITY, PARTNER- SHIP OR FIRM TAXED.	Buildings and Improvements Separate from Lands.	Clocks, Watches, Jewelry, etc.	Gold and Silver Plate.	Wares and Merchandise.	Horses, Mules, Cattle, Sheep, and Hogs.	Vehicles of all Kinds.	Stocks or Bonds other than U. S.	Moneys on Hand, on Deposit or at Interest.	Notes, Bills, Obligations, etc.	Household Furniture Exceeding \$50.	Pianos, Melodeons, and Organs.	Miscellaneous.	Total of Personalty.	Amount of Tax.	Remarks.
Bank of Vicksburg for 1886	-----	-----	-----	-----	-----	-----	-----	\$10,000	-----	-----	-----	-----	-----	-----	-----
Bank of Vicksburg for 1887	-----	-----	-----	-----	-----	-----	-----	10,000	-----	-----	-----	-----	-----	-----	-----

This assessment had been duly approved by the proper authority. The bank offered to show, by parol, in connection with said roll, that the \$10,000 upon said assessment for said years, 1886 and 1887, was not, as shown by the roll, "money on hand, on deposit or at interest," but was its capital stock, and that it had paid its taxes on said assessment. The court below excluded this evidence, but permitted the revenue agent to show that the \$75,000 on the assessment, the correctness of which was the subject of litigation, was capital stock, and not "horses, etc."

The defense for the years 1888 and 1889 was, that the bank had paid a privilege tax for said years, under the act approved March 8, 1888 (Laws, pp. 15, 16). Under this act, the privilege tax exempted the bank from *ad valorem* taxes, but there was no such exemption in 1886 and 1887.

The verdict of the jury in the circuit court was in favor of the plaintiff, Adams, revenue agent, for the years 1886 and 1887, fixing the amount of the assessment for each of said years at \$60,000, and for the bank for the years 1888 and 1889, and judgment was entered accordingly. Both parties appealed.

Brief for appellant.

Dabney & McCabe, for appellant bank.

The points which we rely on, and ask to be specially considered, are: 1. The assessment sought to be enforced is void. 2. The assessment given in by the Vicksburg Bank, on February 15, 1894, should have been admitted in evidence.

The notice from the revenue agent to the assessor does not describe any property. Neither does the assessment made under that notice describe any property. The notice describes "Vicksburg Bank" as the property to be assessed, not the owner of the property, but as the property itself. The law (Acts 1894, p. 29) requires a notice of what property has been discovered as a condition to an assessment made at the instance of the revenue agent. The assessment itself does not describe any property, but assesses the Vicksburg Bank as owner with \$75,000, which is the valuation of no property described, unless it be "horses, mules, cattle," etc., at the head of the column, and there was no effort made on the trial to prove that the Vicksburg Bank owned any horses, mules, cattle, etc. The argument was that, inasmuch as by law a bank is subject to be taxed only on its capital stock, the inference would be drawn that this was intended to be assessed. What are and what is necessary in assessments? Listing or describing is necessary. See 25 Am. & Eng. Enc. L., 199, note 2.

This is a proceeding *in invitum*, and no authorities are needed to be cited to the point that to fix a liability upon a taxpayer, strict conformity to the law is required. Banks are liable to be taxed upon their real estate, yet this assessment does not inform this bank that the assessment is not intended to cover real estate. The argument that the law presumes the assessment to be upon capital stock, proves the error of the lower court in excluding the assessment given in by the bank on February 15, 1894, because its figures were under the head lines of "money loaned at interest," etc. This assessment is void, for the further reason that the revenue agent was not authorized to give notice to the assessor to make an assessment

Brief for appellant.

in this case, the property not having escaped taxation by reason of not being assessed. (Acts 1894, p. 29, § 3.) It will hardly be disputed that it was the duty of the city assessor to assess property subject to taxation, which had escaped taxation for former years. This court has held that a former act of the legislature requiring the revenue agent to make assessments, was unconstitutional, because it sought to supply the place and perform the functions of a constitutional officer; and the present act is sustained only because it does not do this, but simply requires the revenue agent to inform the assessor that he has discovered property which has escaped taxation. The assessor is then required to make the assessment. If he can make the assessment when this notice is brought to him in that way, he can certainly make it when he acquires information from other sources. In other words, it is the assessor who makes the assessment, and, if he can make it at all, it is his duty to make it whenever he discovers that the property has escaped taxation. There is no express provision, that we know of, for the assessment in the city, of property for taxation, which has escaped taxation in former years, and the act of 1894 does not confer any such authority. It seems to be assumed that the charters give this authority. The "assessor" referred to in the act seems to be the county assessor. Nothing in the act indicates that the assessor there referred to is the city "assessor and collector," and it is a mere inference that he was intended to be described. It is evidently the same assessor who is to give the notice to the board of supervisors and the board of mayor and aldermen, and it seems to us, possibly, a valid objection to this assessment, that the revenue agent gave notice to the city "assessor and collector" instead of to the county "assessor" in this matter.

At all events, it could not have been the policy or purpose of this act to authorize the state revenue agent to cause to be assessed property which had already been assessed by the city assessor, and which was then on his roll or in his hands for en-

Brief for appellant.

tering. Indeed, nothing but abject fear on the part of this assessor induced him to undertake to make a second assessment when he had already officially performed his duty. If he could legally make an assessment when notified by the state revenue agent, it was his duty, and he could legally perform it without such notice. How can the assessor have in his hands at the same time two assessments against the same property? Shall the first be set aside in order to give the revenue agent a commission of twenty per cent. for giving notice to the assessor of a fact already known to him, and upon which he had officially acted—a fact which the revenue agent could have ascertained from the records in the hands of the assessor to whom he was giving the notice?

The assessment made under the revenue agent's notice was on the roll of 1893, a roll which had no further office or function to fill. The assessor could not legally have entered the assessment upon that roll. At that time, May, 1894, the roll was in the hands of the "assessor" as such, and not in the hands of the "collector," as held by this court in *Revenue Agent v. Brennan*, 72 M. R., 894. Hence it must have been the new or 1894 roll which should have been used.

We are at a loss to conjecture what the argument will be to sustain the action of the court in excluding the assessment returned by the assessor on the return given in by the Vicksburg Bank on February 15, 1894, upon the ground that the figures "10,000" were under the head line of "money loaned at interest," etc., when they are under obligation to make argument in support of the action of the court in admitting the revenue agent's assessment over defendant's objection when the figures "75,000" were under the head line of "horses, mules, cattle," etc. How is it possible to reconcile these two rulings? The head lines are printed on the pages for convenience and to save the trouble of writing out the names of things taxed. They do not become part of the assessment roll unless adopted as part. The principle that written instruments,

Brief for appellee.

signed by the parties, cannot be qualified or altered by parol evidence, has no application here at all, and we assert with confidence that no law can be found sustaining a contrary contention. The general rule will be found in *Greenl. Ev.* (15th ed.), secs. 276-279; *Rice Ev.*, vol. 1, sec. 157.

By sec. 279, *Ib.*, *Greenl.*, it will be seen that it only applies to parties, and does not affect third persons, and they are allowed to prove the truth.

Treating this action as an adjudication by the board of mayor and aldermen, evidence would be admissible to show what was adjudicated. *Wells Res Ad.*, sec. 297 *et seq.*; 1 *Greenl. Ev.*, 279.

Calhoon & Green, for appellee, and cross appellant, Adams.

It is objected that the "notice" by the revenue agent does not describe any property. This was not necessary, because by sec. 3, act 1894, p. 29, it is provided that if the revenue agent shall discover that any person, corporation, property, business, occupation or calling has escaped taxation, it shall be his duty to give notice, etc. The "corporation"—bank—had escaped taxation; and the notice so informs the assessor and collector. Upon this, it was the duty of the assessor and collector to assess the bank. The only method known to the law of assessing banks for 1886 and 1887, and 1888 and 1889, was upon their capital stock. Hence, the notice, in the language of the law, was a notice to assess the capital stock of the bank.

In tracing the history of taxation in this state, it is discoverable that bank stock has not been taxed as such by name in the hands of the shareholder or owner, but was assessable to the bank. *Vicksburg Bank v. Worrell*, 67 Miss., 47; *State v. Simmons*, 70 Miss., 485; *Bank v. Oxford, Ib.*, 504.

When the "notice" and "assessment" were offered in evidence, the record shows only a general objection, except that "one ground of defendant's objection to the assessment was that the figures showing the amount of the assessment were in

Brief for appellee.

a column with headlines showing "horses and mules" to be assessed, and not capital stock. Hence, this objection cannot be considered here. Objections to evidence must be specific and not general. "It is proper, in objecting to evidence, that the ground of the objection should be stated, as in that way only can parties be confined in this court to the same ground of objection which was taken in the court below." *Doe v. Natchez Ins. Co.*, 8 S. & M., 197, 208. Counsel argue that banks are liable to taxation on their real estate as well as upon their capital stock, and therefore that this assessment is uncertain. Banks, under § 498, code 1880, were not taxed on real estate. The only *ad valorem* tax a bank could owe, legally, was on its capital stock. This was pointedly illustrated in *Bank v. Oxford*, 70 Miss., 504. In that case there was no assessment whatever, and a bill was filed by the bank to enjoin an action at law by the city for back taxes. Upon a cross bill the right of the city to collect these taxes was upheld. If it had required an assessment of specific bank stock against the bank, then no such relief could have been granted. The relief was granted because § 498, code 1880, imposed *ad valorem* taxes on all the capital stock of the bank, and that was the only thing assessable against the bank.

It is objected that the assessment was under the headlines "horses and mules." An inspection of the record will demonstrate the absurdity of this contention. The whole additional assessment is written out on the page without any reference to the printed headlines, and the court below, on an inspection of the paper, admitted it in evidence. The statement of the witness that it had no reference to the headlines, was but cumulative evidence of what the paper itself showed, and its admission could possibly do no harm. Besides, if we treat the paper itself as doubtful evidence of what was intended, and apply the explanation to the doubt, it would be perfectly competent. This is unlike the pseudo assessment pretended to have been made, which put the \$10,000 in the column of "money

Brief for appellee.

loaned," etc., upon a regular assessment roll, without any suggestion of any doubt as to its proper place, and which could only be changed by a flat contradiction of the record.

Again, it is said that the county assessor was the proper party to make this municipal assessment. It is perfectly manifest that the "assessor" and "collector" of ch. 34, Acts 1894, are the county assessor and collector when applied to state and county affairs, and the city assessor and collector when applied to municipal affairs. The county assessor and collector never have the municipal rolls in their hands, and *vice versa*, and it is "on the roll or tax list in his hands" that the assessment is to be made.

The court did not err in excluding the pretended assessment made by Kiersky.

It will be noted that the revenue agent has been after this bank for years to collect these taxes. This court uniformly denied him the power to collect these taxes until the Act of 1894, approved February 7, 1894. Then, by some mysterious process of telepathy, the assessor and collector of Vicksburg, it would seem, awoke to the fact that this bank had escaped taxation for the years 1886 and 1887, and the assessment is recited to be demanded by the assessor, and on February 15, 1894, the bank, by affidavit of its president, returns an assessment under protest, denying all liability on the capital stock paid in, \$75,000, and placing the market value of capital stock at \$10,000. There is no offer to show that this pseudo return was delivered to the officer before adverse notice. The assessor was notified by Adams on May 19, 1894, to assess the Vicksburg Bank, and on May 21, 1894, the assessor notified the board that he had assessed the bank under Adams' notice. On June 21, 1894, before any return of the assessment roll of 1894 upon which the pseudo assessment appears, the board considered the Adams assessment, disallowed it, and Adams appealed. Afterwards, the assessor returned the regular roll of 1894 with an assessment in these words:

 Brief for appellee.

	MONEY ON HAND, ON DEPOSIT OR AT INTEREST.
Vicksburg Bank for year 1886	\$10.000 00
Vicksburg Bank for year 1887	10.000 00

And it was offered to be shown that the regular roll of 1894 containing this assessment was approved August 20, 1894. It thus appears that the pseudo assessment was not made until after the Adams assessment, and then it was made not in pursuance of the return of capital stock, but was on "moneys on hand, on deposit or at interest," and the assessment so made was approved by the board. The object of the effort to introduce this assessment on "moneys on hand, on deposit or at interest" in evidence was to bar this assessment by *res adjudicata*. When the record was produced, it showed that the assessment was not on capital stock, but on "moneys on hand," etc., and hence, that assessment was no bar to this one, as was decided in *State v. Simmons*, 70 Miss., 485. Counsel confuse the facts and principles applicable to the two assessments, when they contend that both are to be judged alike. The Adams assessment was being established in a direct proceeding for that purpose, and the assessment itself shows on its face that it had no reference to the headlines of the page. The pseudo assessment is introduced as a bar by matter of record, and, hence, it is unamendable in this proceeding. It must stand or fall by its own terms. It is not subject to collateral attack or explanation. The judgment of the board was invoked upon an assessment upon "money on deposit," etc., not upon capital stock. The assessor did not assess capital stock. There was a column on the roll for stocks or bonds, and yet the assessor assesses money on hand, etc. After the pseudo assessment passed into judgment final, by approval on August, 1894, its terms could be altered, if at all, only in a direct proceeding for that purpose, and then only upon the ground of fraud. *Redmond v. Banks*, 60 Miss., 293, 298; *State v. Simmons*, *supra*; *Griffin v. Levee Commrs.*, 71 Miss., 767. It could not be a

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bar to a proper assessment of capital stock. If the judgment was erroneous in not describing the property really sought to be taxed, the remedy of the bank was by appeal to correct the judgment. As long as that judgment stands unreversed, it is conclusive that "money," etc., was assessed, and not "capital stock."

On cross appeal.

1. The court erred in refusing the peremptory instruction for Adams for 1886 and 1887, for the whole \$75,000 assessed. There is no question but that the capital stock of the bank, at its market value, was taxable for 1886 and 1887, and that the capital stock paid in was \$75,000 in 1878.

(1) It was assessed at \$75,000. This assessment was *prima facie* correct, and the burden was upon the bank to disprove it. The person assessed must make his objections, and, of course, sustain them by proof, otherwise the assessment is approved, as of course.

(2) The conceded failure of the president and cashier to render the statement required by § 498, code 1880, made the whole capital named in the charter taxable, and the minimum amount of capital stock named in the charter was \$75,000.

(3) It was admitted that the bank paid a privilege tax for 1886 and 1887 of \$300, and this was the sum required of a bank "with capital stock or assets in excess of \$100,000 and not more than \$150,000." (Acts 1886, p. 19.)

The first instruction given for the bank is erroneous, because in an assessment, as here, by an officer, as part of his official duty, the presumptions of law and fact are in favor of and not against the record so made. The statute requires "objections" to be made, and these objections are tried, and not the assessment itself. Hence the instruction was wrong as to the burden of proof.

The second instruction so given is erroneous, because, first, the defendant had not paid all the taxes on \$75,000 for the year 1888 by the payment of the privilege tax of \$750. This

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privilege tax was paid, as appears from the receipt, on June 1, 1888. The instruction recognizes the law to be that the *ad valorem* tax became a debt on February 1, 1888. Under the law in force on February 1, 1888, an *ad valorem* tax was due by the bank, as the privilege tax under act of 1886 was, in addition to *ad valorem* taxes. On March 8, 1888 (Acts 1888), the privilege tax thereby imposed was made in lieu of all other taxes on the amounts of capital stock and assets therein named. But the bank did not pretend to pay a privilege tax under this act until June 1, hence the *ad valorem* tax attached, and it was the duty of the president to make the return, on or before June 1, 1888, of the capital stock subject to taxation under § 498, code 1880. The failure to pay the privilege tax under the act of 1888, during the month of March, subjected the whole capital stock to taxation for that year. The bank could not, from February to June, be exempt from *ad valorem* taxation by subsequently, in June, paying a privilege tax; hence, by failing to pay the privilege tax in March, 1888—that is, within the month when it was imposed—the privilege tax did not secure to the bank immunity from *ad valorem* taxation. It is competent for the legislature to change the system of taxation, even though the new system results in forfeiture of benefits secured and paid for under the system repealed. *Attala County v. Kelly*, 68 Miss., 40. If the property exists on February 1, it becomes taxable against the then owner, and no change in its status, except under some statutory exemption, would relieve it of such taxes.

Argued orally by *M. Green*, for appellee.

WHITFIELD, J., delivered the opinion of the court.

It was not competent to show, by parol, that the \$10,000 assessed to the bank on the assessment roll, as money loaned or on deposit, was capital stock, because this was a completed roll. It had passed by the conjoint action of the citizen and

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the taxpayer into a completed record. The assessor had made his demand for the additional assessment. The bank had made its return. The assessor had entered the assessment formally on the assessment roll, and the bank had allowed the time within which it could have amended the misdescription (if it were one) to go by without pursuing the method for correction pointed out by the statute, and the board had approved the assessment. It is well settled by several decisions that in such case mere irregularities, such as misdescription, cannot be availed of by collateral attack, in the absence of fraud. It was competent to show by parol that \$75,000 related to capital stock, and not to horses, etc., because that was not a completed assessment. The whole assessment was *in fieri*, and is now, in this suit, undergoing direct adjudication. In this last case it would seem that, without parol proof, a mere inspection of the face of the entry on the roll would disclose what is meant.

The bank had paid a sufficient privilege tax (\$300) to protect it, so far as the privilege was concerned, from June 1, 1886, to June 1, 1887, and from June 1, 1887, to June 1, 1888, paying from June 1 to June 1; and so it paid a privilege tax of \$750 from June 1, 1888, to June 1, 1890, for each of the two years. The fourth section of the act of March 8, 1888, provided that if a proper privilege tax had been paid before its passage, it should protect the privilege till the expiration of the license. This (taking \$750 to be the proper amount, as found by the jury) protected the bank, so far as the privilege was concerned, for the years 1888 and 1889.

The return made by the bank to the auditor under the act of 1888, does not estop the bank from showing the truth. It, if incorrect, goes to the credibility of the officer making the return. It is a mode of ascertaining the assets of banks, but not the exclusive mode; and the act of 1888 changed the scheme of taxation, and exempted the bank, paying the proper privilege tax from *ad valorem* taxation. The case of *Sun Ins. Co. v. Searles*, 73 Miss., 62, has no application here. Penalty for

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making a false return is provided. We think the right result has been reached, and the judgment, both on the appeal and the cross appeal, is *Affirmed.*

Rehearing: A reargument was granted in this case, on the application of the bank, and it was argued a second time by the same counsel who represented the respective parties when the cause was first submitted, *Dabney & McCabe*, for appellant, and *Calhoon & Green*, for appellee.

WHITFIELD, J., delivered the opinion of the court.

A careful re-examination of this record has only strengthened the view first announced. It is perfectly manifest from the "assessment ordinance" that the list made by the assessor, and not the 10,000 fugitive lists returned by individual taxpayers, constitutes the assessment roll on which the board acts. Section 3 declares that the assessor and collector shall complete making his "list," etc., not "lists." The singular is used, not the plural. Section 4 provides that "the board of mayor and aldermen shall review and revise such list," not "lists." The singular, not the plural, is used. Section 5 provides that "the board of mayor and aldermen will consider and pass on objections filed, and thereupon the assessor and collector shall make up his assessment rolls from the list so revised and passed upon," etc., the singular, not the plural—"list," not "lists"—being used. The opinion and judgment heretofore rendered are adhered to.

Motion to award damages.

After the delivery of the above opinion, a motion was made by Adams, state revenue agent, to amend the judgment of the court so as to award five per centum damages, under § 4360, code 1892, against the bank.

Calhoon & Green, for the motion.

Dabney & McCabe, contra.

Opinion of the court.

The following opinion was delivered on the motion:

WOODS, C. J., delivered the opinion of the court.

The judgment appealed from in this case to this court was simply one declaring the appellant bank properly assessable for taxes whose assessment and payment the bank had escaped for the years 1886 and 1887, and fixing the valuation of the property, or the amount of the assessment, at \$60,000 for each of said years. There was not, and, in the nature of the case, there could not have been, a judgment for a sum of money declared to be due from the bank to the city of Vicksburg. It is not a judgment for the possession of property, real or personal; it is not a judgment for the dissolution of any restraining process; and it is not a judgment for the sale of property to satisfy a sum out of the proceeds of sale, or to enforce or establish a lien or charge or claim upon property. The case is not embraced within the terms of § 4360, code 1892, and damages can only be awarded in the cases expressly provided for by the statute. *Redd v. Thompson*, 56 Miss., 230.

The judgment is in no proper sense one contemplated by § 4360, but is purely a judgment fixing an assessment on the bank for taxes not theretofore assessed or paid. In this judgment are two fundamental findings, viz.: (1) That the bank's property was liable to taxation; and (2) that the valuation of the property or the amount of the assessment was \$60,000; but there is nothing more. There is no intimation in the judgment of any sum of money due by the bank, nor was there any necessity for any judgment for any sum. Liability to taxation being found by the judgment, and the amount of the assessment or the valuation of the property being also found by the judgment, the court below had reached the limit of jurisdiction in the matter. Without an appeal from that judgment, the city authorities would have proceeded to collect the municipal taxes in the manner prescribed by law, and, with an appeal and an affirmance of the judgment below, the city authorities will

Syllabus.

likewise proceed to collect the proper taxes; but the amount to be collected was not adjudged by the circuit court, nor was it within the province of that court so to do in this proceeding. *Clark v. Bank*, 61 Miss., 614.

Under this view as to the imposition of the damages sought to be secured by the motion now before us, it will readily be seen that we cannot allow the damages claimed in the motion.

Motion denied.

V. V. DUNLAP, EXR., v. A. E. FANT ET AL.

74 197
177 385

1. WILLS. *Devise to heir at law. Common law rule. When inapplicable.*

The rule of the common law that a devise is void whenever the heir at law would take thereunder the same estate in quality that he would otherwise take by descent, is invoked to no purpose when the will contains other provisions with which its application does not consist.

2. SAME. *Estate for life. Vested remainder. Defeasance.*

When, by the terms of his will, a testator, who has several children, devises his real estate to his wife for life, with remainder over at her death to such of his lawful heirs as may then be alive, and the children of such as may have died, *per stirpes*, and directs that the property shall not be divided or disposed of until one of his daughters attains her majority or marries, the children of the testator take, by purchase, vested remainders, subject to defeasance by their deaths during the continuance of the life estate, and the descendants of such of them as have died during the same time also take by purchase as ulterior limitees, and not as heirs of the testator.

3. SAME. *Sale under execution. Right of purchaser. Defeasance of remainderman's interest.*

When a vested remainder is defeated by the death of the remainderman during the continuance of the particular estate, his judgment

Statement of the case.

creditor has acquired nothing by a previous purchase of his interest at execution sale.

4. JUDGMENT OF JUSTICE OF THE PEACE. *Sale of land thereunder. Filing transcript.* Code 1880, § 2211; code 1892, § 3499.

A sale of land under the judgment of a justice of the peace is invalid, where there is a failure to comply with the statute requiring a transcript of the proceeding in which it was rendered to be filed in the office of the clerk of the chancery court of the county in which the land lies.

FROM the chancery court of Noxubee county.

HON. T. B. GRAHAM, chancellor.

Andrew Conner died in 1853, leaving a will in which the following clause occurs: "I will and devise all my real estate to my beloved wife, Rosanna, for and during her natural life, for the use and benefit of herself and such of her children as shall live with her, . . . and upon the death of my said wife, said real estate shall go and descend to my lawful heirs, share and share alike. But not to be divided or disposed of until my daughter, Mary A. E. Conner, attains to the age of twenty-one years or marries, at which time, if my wife be not living, said real estate shall be divided equally among my said children, and if either of my said children be then dead, leaving a child or children, such child or children shall have the portion to which the parent would have been entitled, if living; and should any of my said children die, leaving no issue, then their portion shall descend to my other heirs."

The testator had several children at the time of the execution of the will, all of whom survived him. All did not, however, survive their mother, the life tenant of the estate. Among those who died during the continuance of the life estate was Mrs. N. L. Cavett, who left two children surviving her, John C. Cavett and Emmett D. Cavett. Mrs. V. V. Dunlap was a purchaser at execution sale, in the lifetime of Mrs. N. L. Cavett, under a judgment recovered against her and John C. Cavett in the lifetime of Mrs. Conner, and received a sheriff's

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deed purporting to convey to her the interest of Mrs. N. L. Cavett. After the death of Mrs. N. L. Cavett Mrs. Dunlap purchased, under the same judgment, the interest of John C. Cavett, and also bought at execution sale under a judgment against Emmett D. Cavett. The judgment against Emmett D. Cavett was one rendered by a justice of the peace, and no transcript of the proceedings had been filed in the chancery clerk's office, as required by § 2211, code 1880, and § 3499, code 1892. The proceeding was one for a partition brought by Mrs. A. E. Fant, one of the children of Andrew Conner, against the other heirs and Mrs. Dunlap, and was not instituted until after the termination of the life estate. The interest claimed by Mrs. Dunlap in the property, as purchaser at execution, sale was the only matter contested between the parties. On final hearing, it was decreed that Mrs. Dunlap took nothing by her alleged purchase of Mrs. Cavett's interest at execution sale in her lifetime; that Mrs. Cavett's children, John C. and Emmett D., became, at her death, entitled to the interest that would have gone to her had she survived her mother; that Mrs. Dunlap was entitled to the interest of John C. Cavett, but not that of Emmett D. Cavett, a failure to file in the proper chancery clerk's office a transcript of the proceedings of the judgment under which it was sold being shown. Mrs. Dunlap appealed.

T. J. O'Neill and Brame & Alexander, for the appellant.

1. The children, including Mrs. Cavett, took by the devise just what they would have taken as the heirs of Andrew Conner, and therefore were in by descent. *McDaniel v. Allen*, 64 Miss., 417; 1 *Fearne on Remainders*, 195, 274; 4 *Kent's Com.*, 507; *Ellis v. Page*, 7 Cush., 161; *Manbridge v. Plummer*, 2 Myl. & K., 276; *Beach on Wills*, § 126; *Davidson v. Koehler*, 76 Ind., 407; *Powell on Devises*, 285. The time of coming into possession, as on the death of Mrs. Conner, is immaterial. 2 *Powell on Devises*, 29, and cases cited.

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2. The attempted substitution of the second clause of the paragraph of the will in question is void, because (1) it substituted those whom the law, as it then existed, substituted, and (2) because, if that is not so, it substitutes a limitation, void for remoteness, and in violation of our statute.

Substituting the "children" of any who should die before the period for division, did not alter the nature of the estate of the first devisees, for it attempted to substitute for certain persons who took, as a class, another class which was the same that the law would substitute. It is well settled that, if the substitutional devise fails because too remote, or because, as in this case, it does not change the course of descent, the estate of the prior takers is not affected. Even if the word issue be held to be synonymous with children, it is still true that, under the law as it existed at the time of the testator's death, the children, as a class, inherited the estate of a deceased parent, and, in default of issue, the estate passed to the brothers and sisters equally. Hence, this clause of the will engrafted on the estate of Mrs. Cavett no conditions that the law did not already affix. The course of descent was not altered.

In providing that if any of his children should die, leaving no issue, the testator clearly did not mean simply children, but descendants. 2 Jarman on Wills.

The attempted substitution of the "issue" of deceased "heir" of testator was void, because the limitation was not inconsistent with the nature of the descent. "If a devise be to heirs or heirs of the body, in the plural, in that case even words of limitation grafted on them not inconsistent with the course of descent, will not convert them into words of purchase." 2 Preston on Estates, 353, 369.

A devise over after dying without "heirs" is, in general, void, yet this rule is not without exception, for if a person to whom a limitation over is made is a relation capable of being the collateral heir, the first devisee takes an estate tail. 1 Fearne on Remainders, 466. When the remainder is limited

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to the heirs of the testator himself, if such heirs must also be the heirs of the first devisee, it means heirs of the body, and the first takes an estate tail. *Id.*, 467. The exception is when the limitation over is to one not in the line of inheritance. *Id.*, 468. It is manifest Conner wished the property to go to his lineal descendants. If the devise to his lawful heirs be operative at all, it is because the subsequent limitation to "issue" shows that he used the words "heirs" as synonymous with "heirs of his body." So construed, the effect would be to create an estate tail, and by statute it would be a fee simple. In construing limitations like these we must not look to what has in fact occurred since the death of the testator, but what was the law at that time and what might occur. Whether a devise violates the rule against perpetuities is to be determined by considering the provisions of the will at the date of the testator's death and looking to the law then in existence. If the ultimate fee in any possible contingency may not vest within the time limited by the rule against perpetuities, the devise is void, and what actually happened afterwards or what laws of descent were afterwards enacted cannot be considered. This being so, it is easy to see that the devise in this case subsequent to the life estate in the widow is void, because too remote. The limit under the then statute was a life or lives in being and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the testator. We have seen that the devise is to the lawful heirs of the testator, and, by implication, to their "issue"—i. e., lineal descendants. What interest, then, did a child of the testator take? The devise to "lawful heirs" being inoperative, each child took by inheritance, unless the subsequent limitations be given effect. As we have seen, this effect must either be that the gift to "lawful heirs" is cut down to an estate tail, and, for that reason, each child took a fee simple, or else the subsequent limitation to this issue shows that, by "lawful heirs" he

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meant heirs of his body, and, therefore, as these may continue for hundreds of years, the devise is void for remoteness.

Let us illustrate: There may be a devise to a succession of donees then living—that is, in this case, Mrs. Rosanna Conner. (The “heirs” or children cannot be counted as in the “succession of donees,” because they do not take successively after the death of Mrs. Conner. By successive donees is meant those who take in succession the same estate, each succeeding one taking nothing till the death of the former taker.) Mrs. Conner, the widow, then, was the only donee in being within the meaning of the statute. It is easy to conceive that on her death each of the children, save one, might die without issue, and the one die last, and leave children, or, perhaps only grandchildren. In that case, the fee would not, after the life in being, vest in the remainderman and the heirs of their bodies, but there would be, first, a life estate in being (the widow’s), and then the interest a child would take in remainder would not be limited to the heirs of his body and in default to the testator’s right heirs, but the remainder over to the brothers and sisters successively through eight of them, the last to take to himself and his issue. See *Cannon v. Barry*, 59 Miss., 289; *Hudson v. Gray*, 58 *Ib.*, 882; *Caldwell v. Willis*, 57 *Ib.*, 555.

Orr & Dinsmore, for the appellee.

The argument for the appellant ignores two fundamental propositions: (1) The intention of the testator in all cases must control, if consistent with law; (2) the essential difference between a definite failure of issue and an indefinite failure.

It cannot be questioned for one instant, after a common sense application of the meaning of the words used by the testator, that he intended his estate to be enjoyed by his widow so long as she lived, and, at her death, that his living children and living grandchildren—*i. e.*, his children and grandchildren living at the time of the death of the wife—should enjoy the benefit of his estate, share and share alike, the grand-

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children to take the share which would have gone to their deceased parent had the parent been alive. It is too plain to admit of doubt that the grandchildren living at the date of the death of the widow, when the life estate terminated, were intended by the testator to be his legatees, if their parent was then dead; consequently the Cavett grandchildren inherited direct from the ancestor on the death of the grandmother. Two bodies cannot occupy the same space at the same time, and it is impossible for Mrs. Cavett and her children to occupy the same space, in legal contemplation, at the same time. The difference of their condition was realized and their different conditions provided for. The ancestor said to the daughter, Mrs. Cavett, "You are my legatee, provided you are alive when your mother dies, but if you die before your mother, then your children living at the time of the death of your mother are my legatees." Mrs. Cavett's children claim through her. They are contingent remaindermen, and the contingency—viz., the death of Mrs. Cavett before Mrs. Conner—occurred. The appellant asks the court to nullify the will in creating the contingent remainder.

This brings us to the second proposition. The court will not destroy this estate in remainder if it was lawfully created. Bingham on Descents, 133 (ed. 1875), with the help of Kent in *Anderson v. Jackson*, 16 John., 399, gives a clear idea of the difference between a definite and an indefinite failure of issue.

If the testator intended a definite failure of issue, the term and conditions of the will are lawful and imperative. If his words contemplate an indefinite failure of issue, then the bequest is void. The definite failure fixes the failure of issue at some particular time within a limit, as the death of the devisee. An indefinite failure of issue is the converse of the last proposition, and means a failure of issue, sooner or later, without any fixed, certain, definite period within which it must happen. It means when the issue or the descendants shall become extinct without reference to any particular time or any particular

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event. Now, we affirm that a happier illustration of Bingham and Kent's description of a definite failure of issue cannot be given than is furnished by the words of this will. "At the death of my wife the real estate shall go to my lawful heirs, share and share alike, to be divided when my daughter Mary is twenty-one years old, at which time said estate shall be equally divided among my said children. And if any of my said children be then dead, but leave child or children, such child or children to take the share the parent would have been entitled to if living." We transpose some of the words for the sake of perspicuity, but the accurate sense of the testator is preserved in the transposition. "Lawful heirs" as first used might be obscure, but, before the sentence closes, he defines the term, and says "my said children." Then follows the definite failure of issue "if either of my said children be then dead" (When? Manifestly when the widow holding the life estate dies), "leaving a child or children" (in other words, leaving me a grandchild or grandchildren—certainly intelligent, and not remote), "such child or children" (Who? The child or children of my dead child or children) "shall have the portion" (What portion? The portion of the dead parent? Not at all. The dead parent took no portion), but the portion "to which the parent would have been entitled if living." These words exclude Mrs. Cavett plainly as words can create an exclusion. Mrs. Cavett died leaving issue. That issue was the grandchildren of testator. The time and the person were fixed and definite. "If, at the death of my wife, any of my children are dead, my grandchildren shall inherit what my dead child would have inherited if she had not died." The validity of such a devise is too plain to be debated. The language of Conner's will and of Thurman's deed in *Harris v. McLaurin*, 30 Miss., 533, is just the difference between the definite and indefinite failure of issue. Conner's will created an estate in remainder, to be vested at a particular time in particular named persons. Thurman was too indefinite. In *McDavit v. Allen*,

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64 Miss., 417, I. H. Bolen took under the will of his father. A life estate was vested in the testator's widow, with remainder to the "heirs of the body" of the testator. I. H. Bolen was his son, and therefore was named in the will. Mrs. Cavett, whose supposed interest was sold by the sheriff, was, by the terms of Connor's will, excluded. The share which Mrs. Cavett would have been entitled to went directly to the legatees, her children. If E. D. Cavett had any interest in the land because of his being the grandson of the testator, it is very clear that the appellant did not acquire it. The transcript of the proceedings had before the justice of the peace who rendered the judgment against him, was never recorded in the chancery clerk's office, and there could, therefore, be no valid transfer of real estate under said judgment. Code 1880, § 2211; code 1892, § 3499. .

J. A. P. Campbell, on the same side.

The death of the widow, Rosanna, was the event on whose occurrence the estate was "to go and descend" (as expressed), but unless Mary A. E. had attained twenty-one years of age or married, it was not to be divided. The plan of the testator is manifest. His widow was to have a life estate, and his children the remainder, but division was not to be made until his widow died and his daughter Mary was twenty-one or married. The death of the widow was the period designated for the estate to go to the remaindermen, but, as this might occur while Mary was under twenty-one and unmarried, no division was to be made until she was twenty-one or married. To refer, then, to Mary's condition, would make the rights of remaindermen depend, not on condition existing at the termination of the life estate, but on a contingency relating to the division of the property. Is it not evident that the testator had reference to the conditions which should exist when the life estate should end? Were the grandchildren substituted by the will for the testator's children on Mary's attaining twenty-one

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or marrying in the lifetime of the mother, the life tenant? Was Mary's age or condition the condition on which it was to be determined whether children or grandchildren were to have the remainder? It was the death of Rosanna which fixed the rights of parties. "And upon the death of my said wife, said real estate shall go . . . but not to be divided," etc. "If my wife be not living (Mary being twenty-one or married), said real estate shall be equally divided among my said children; and if either of my said children be then dead," etc. It was the death of Rosanna on which the rights of ulterior limitees depended, but, as that might occur before Mary was twenty-one or married, for her sake division was not to be made until she was the one or the other. Title was fixed upon the death of the widow. Division depended on Mary being twenty-one or married. Her age and condition affected division, not title. The life tenant long survived the attainment of Mary's majority, and her death brought not only the end of the life estate, but determined the relative rights of children and grandchildren. Her death is the only period to be referred to. It was only in case the life tenant was dead that Mary's condition was made a feature of the will. It is inserted parenthetically, and solely for Mary's benefit, and not as affecting any right except to a division of the property. If Mary had died before the end of the life estate, the rights of remaindermen would have been in no manner affected thereby, and if Mary had attained twenty-one or married in the life of Rosanna, no division would have been allowable then. *Hancock v. Titus*, 39 Miss., 224, and *Sims v. Conger*, *Ib.*, 231, show that the word "then" is referable to the death of the life tenant. They show, also, that "dying without issue" means a definite failure of issue (those living at the death, etc.), and therefore an estate tail is not created by these words. 8 Paige, 483; *Busby v. Rhodes*, 58 Miss., 237. A complete answer to the argument that the will creates an estate tail is a quotation from Fearn on Remainders, marg. page 547, par. 7, in these words: "Where

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the limitation over is on failure of issue generally, but the testator, in another passage, refers to the same persons by the name of children, and thereby explains that, by the word 'issue' he means children, of course it is the same as if the limitation over were expressly by failure of children."

In *Sims v. Conger*, 39 Miss., 231 (312), the words of the contingency were die "without issue." The statute fixes the meaning of such words, and prevents the creation of an estate tail by their use. *Maurice v. Graham*, 8 Paige, 483. If, as argued, the devise to heirs was void, it left the reversion in the testator and disposable by his will (*Harris v. McLaran*, 30 Miss., 533), and it was disposed of as stated. But it was not void. It is manifest that the testator employed the word "heirs" for children. Besides, the will does not give precisely the estate which would have descended. An estate by descent would not have been subject to the ulterior limitations imposed by the will. It was, therefore, not the same estate. It would have been alienable by the remainderman and transmissible by descent downward or upward, or to collateral heirs, if an estate by descent. An estate by descent is indefeasible, unconditional, and not subject to ulterior limitations, as this estate was. The ulterior limitation or executory devise was not void as after an estate tail or for remoteness. It was made in 1853, when any number of lives in being were admissible as successive donees. It was in 1857 when the number of donees in succession was limited to two. Prior to that any number of lives in being might be grantees, with remainder to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor in fee. The limitation was authorized by the statute then in force, whatever may be true now.

Cholmondeley v. Mawley, 12 East, 589, is exactly in point, for it was a devise, and doubtless many such cases may be found, if any are desired. The suggestion of no reversion in a testator is unavailing, for surely he could devise whatever he had not

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made a valid disposition of, and even of two valid devises, the last would prevail. So, in any view the ulterior limitations of the remainder were valid, and to be upheld. If the remainder was void, only the life estate was disposed of, and the rest of the fee was disposable by the testator. A void disposition is as if it did not exist. The will gave a life estate in the land to the widow, with remainder to children, vested, but defeasible. If any died before the death of the life tenant, the estate was to go to others—a substitutional gift, an executory devise, a defeasible estate, to shift from one to the other object of the testator's bounty, according to the conditions existing at the termination of the life estate—a familiar sort of limitation, and beyond legal exception. Jarman on Wills, marginal page 824, top 837.

Can it be that a father may not now limit land to his children (not exceeding three) in succession, and to the heirs of the body or issue of the survivor, and in default of any of his right heirs? Surely he may, and, prior to 1857, he might limit thus to any number of living persons. And this is exactly what Conner did. By the will, Mrs. Cavett, a daughter of the testator, took a vested remainder, subject to be divested by her death during the life of the life tenant, in which case her portion was to go to her children. She did die in the lifetime of the tenant for life, leaving children in whom her portion under the will vested. Her vested remainder was vendible under execution, and was sold, but the purchaser got no greater title than she had, and took the estate subject to the defeasible condition on which she held it, so that, when she died before the time when the estate was to go according to the will, the interest held under her was immediately vested in her children. A careful examination of the authorities will show that the rule that a conveyance or devise to one's heirs is void had reference entirely to the estate which the heir took in such case. It is now here questioned that, notwithstanding such a limitation, an ulterior valid limitation might be made. Not only 30 Miss.,

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533, but 2 Atkyns, 55, 57, and *Cholmondley v. Maxey*, 12 East, 589, and other cases, show the rule and its operations to be as I contend, and any other view must be unsound. The proposition that Mrs. Cavett acquired an interest independent of the will by the demise of three of her brothers is untenable, for the reason that the will operated on all the interests and prescribed the rights of persons taking under it, as of the date of the termination of the life estate. All the directions of the will as to any of the children being dead without leaving children, had reference to the termination of the life estate. As each remainderman died, without children, his share vested in the others, and all subject to the final disposition prescribed at the termination of the life estate, Mary being twenty-one or married. Such is the will. But according to the argument that the will did not vest any interest, and that the children took as heirs by descent, the three who died had nothing to transmit, since, if the devise was void, it left the reversion in the testator and subject to his disposal (*Harris v. McLaran*, 30 Miss., 533), and he certainly did dispose of all the remainder, by plainly providing that certain persons should take, in the final disposition directed to be made, after his widow should die and Mary be twenty-one or married. Both events were to precede actual enjoyment of the estate by remaindermen, but death of the life tenant was the event with reference to which rights were fixed. The intent of the testator is to be gathered from the whole will, and is plainly as I contend. The infallible test is, Mary's marriage or attaining twenty-one in the lifetime of Rosanna would not have affected any rights. Mrs. Dunlap did not acquire title to what she purchased at execution sale by virtue of a judgment of a justice of the peace against Emmett Cavett. The statute was not complied with, and the court could not recognize her as owner of this interest. If she had acquired it, she should have shown it. It seems that the sheriff had conveyed the interest sold, and the deed had been filed and recorded, without the transcript of the justice's judgment, as required, and this

Brief for appellee.

deed was excluded as insufficient to vest title under a justice's judgment.

That the limitations are just as the statute of 1822 (in force when the will was made) authorized, see 4 Kent's Com., 280. If the court will look into the earlier cases, and trace the rule that a man cannot give his heir what the law would give him, it will see that the rule is to determine, whether the heir is in by the will or by the law; and I think I may safely affirm that not a case exists which holds that the nature of the heir's estate (whether by the will or by law) in any manner affects an ulterior limitation. Such a view would be an absurdity, as it appears to me. How could the question whether the heir took by the will or by law, have any effect on the limitation of the estate beyond him? It is not like the rule in Shelley's case, where certain words vest the estate in the first taker. It is nothing of that sort, and is simply a question whether the heir holds what is given him by the will or by the law of descent, and not whether what is given to another beyond him is valid or not as a gift. The latter is independent of any question as to the nature of the heir's holding, as being by the will or by the law.

I have traced the rule and examined numerous statements of it, but have not burdened my brief by extended discussion, because it seems too plain for more than a mere statement that this rule has no application in this case, and cannot cut any figure in it. An estate by descent is absolute and indefeasible, alienable, transmissible to heirs in descending, ascending and collateral lines, without any contingency or limitation over, and therefore different from that given by this will; and for that the rule does not fit this case. But, if that were not the case, how could the nature of the heir's estate exert any influence on the limitation after him? It is not matter of concern what sort of estate the heir had, for whatever he had passed out of him or her, on a certain contingency. Counsel, invoking the rule, commits the error, I think, of confounding this rule with that which causes certain

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words to be treated as words of limitation bounding and marking the estate of the first taker, and therefore cutting off ulterior limitations. This rule has not a single feature in common with that, and was never attempted to be so applied as to have such effect. It has to do only with the nature of the heir's estate, and has nothing to do with ulterior limitations beyond his estate.

Argued orally by *C. H. Alexander*, for the appellant, and by *J. A. P. Campbell*, for the appellees.

COOPER, C. J., delivered the opinion of the court.

By reading the whole will of Conner, it appears that the following disposition was made of his real estate: (1) A life estate was given to his wife, Rosanna. (2) On the death of the tenant for life the fee was given to such of his children as should then be alive, but if any child should have died leaving children, such children should take the part the parent would have taken if alive. But the estate should not be divided so as to break up the domestic establishment (a farm) until the daughter, Mary A. E. Conner, should arrive at the age of twenty-one or marry.

The children of the testator took vested remainders in fee, for they were in being, capable of taking, if at any time the particular estate should determine, and the estates to which they were entitled might be of indefinite duration. But this fee was subject to defeasance by the death of any remainderman during the life of the tenant for life. If a remainderman died leaving no descendants, his estate, at the death of the life tenant, passed to his brothers or sisters or their descendants; if he died leaving children—*i. e.*, descendants—who survived the life tenant, the estate was limited over to such descendants. In such case the descendants took not the estate of their parent by descent, but they took a new estate as purchasers, limitees under the will of Andrew Conner.

The rule of the common law is that wherever the heir at law

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of the devisor would take the same estate in quality under the will as he would take by descent without it, the devise is void, and he takes by descent. It is said that this rule was originally adopted into the law, first, for the benefit of the lord, to preserve the tenure and entitle him to the fruits of it; secondly, for that of creditors and others having demands on the ancestor's estate, and, in some instances, for the advantage of the heir himself, as it would toll a right of entry, or entitle him to the benefit of a warranty.

The rule seems to have prevailed though the estate given to the heir was charged with debts, or was preceded by a life estate to another, or though the estate given to the heir was subject to a condition or defeasance. *Moe v. Timins*, 1 Barn. & Ald., 532; *Manbridge v. Plummer*, 2 Mylne & Keene, 23; *Ellis v. Page*, 7 Cush. (Mass.), 161.

Mr. Crosby gives as a test, to strike from the will the devise to the heir, and then consider whether he would take by descent the same estate. If he does, the devise is void. 4 Kent, 507. But you may not strike from the will other distinct provisions, limitations, or charges, merely because they are connected with, related to, or dependent on, the estate attempted to be devised, for, though they do not operate as an alterative of the estate, they bind the estate, whether it be taken by devise or descent.

The appellant invokes this rule of the common law as destructive not only of the devise to his children by Conner, but also as nullifying the ulterior limitation to the children of such of the remaindermen as should die during the life of the tenant for life. Counsel argue that the appellees were the heirs at law of Conner when the death of the life tenant occurred; that both the devise to his heirs at law (those who were such at his death) and that to their descendants, if they should die during the life of the widow, the life tenant, were void, because they gave precisely the same estate which would have descended. The error lies in considering these ulterior limitees as heirs in

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any sense of Conner. They were not his heirs at all, for if he had made no will they would have taken nothing by descent. The fact that Mrs. Cavett, the mother of the appellees, died before the life tenant, and that appellees, but for the will, would have inherited whatever interest she then had, does not show that they would have taken by descent this or any other interest upon the death of Conner intestate.

Mrs. Cavett, as we have said, took a defeasible fee in remainder, but it was divested by her death during the life of Mrs. Conner, and the appellees took as purchasers under the will, and not by descent. Mrs. Dunlap, by her purchase, got only the estate which Mrs. Cavett had, and that ended at her death. *Ebey v. Adams*, 135 Ill., 80.

The execution sale of the interest of Emmett Cavett failed of effect, for the reason that the matter was not dealt with in the manner directed by law. Where sales of land are made under judgment from a justice of the peace, the title is not complete until a certified transcript of the proceedings had before the justice is filed with the conveyance made by the officer in the proper chancery clerk's office. Code 1880, § 2211; code 1892, § 3499.

The decree is affirmed.

Statement of the case.

CEPHAS HAMMOND v. STATE.

1. CRIMINAL LAW. *Indictment. Incompetent testimony before grand jury.*

An indictment should not be quashed because the grand jury heard incompetent testimony.

2. SAME. *Grand jurors as witnesses.*

Grand jurors are incompetent witnesses to prove upon what evidence an indictment was found.

3. SAME. *Reasonable doubt. Instruction. Conscientious belief.*

The word "conscientiously" is a word of quality and not of quantity, and ought not to be used in charges as to a reasonable doubt, but if the charge be that the jury, before convicting, must take into consideration all the evidence and "conscientiously" believe, beyond a reasonable doubt, defendant guilty, the word is mere surplusage.

4. SAME. *Good character.*

The influence of evidence showing the good character of defendant should be left to the jury, and the court should not instruct that it is, or is not, sufficient to raise a reasonable doubt of guilt.

FROM the circuit court, first district, of Panola county.

HON. EUGENE JOHNSON, Judge.

Cephas Hammond was indicted by the grand jury of the first district of Panola county, in March, 1896, for the murder of his stepson, an infant about two years of age. The indictment was adjudged defective and a second one was found. The defendant moved the court to quash the second indictment, because his wife, the mother of the child, had testified to material facts against him before the grand jury and the indictment was found upon her testimony. On the hearing of the motion several members of the grand jury were introduced as witnesses by the defendant without objection by the state. The motion was sustained, and the second indictment (No. 986) was quashed.

Brief for appellant.

The state excepted to the ruling and appealed therefrom. The grand jury still being in session, a third indictment was found against Hammond charging him with the same offense. He was tried upon the last indictment, convicted, and sentenced to the penitentiary for life, and appealed. The testimony against him was almost wholly circumstantial. The instruction given for the state, passed upon in the opinion of the court, is in these words: "The court instructs the jury for the state that you are not required to know that defendant inflicted wounds on the child by violence, nor is it necessary for you to know that the child died from such wounds. All that is required is for you to take into consideration all the facts and circumstances in evidence and from them to conscientiously believe beyond a reasonable doubt that he made wounds on the child from which it died."

W. D. Miller, for appellant, Hammond.

The evidence in this case against the accused is wholly circumstantial, and falls very far short of that standard or degree of proof absolutely essential to conviction under the well-established and familiar rules in such cases. There was no proof whatever that the accused inflicted the alleged wounds upon the child, or, even if he did, that these wounds produced the death. There was no proof as to the cause of the death. The alleged threats of the accused against the child, as well as the mother, if made by him at all, were without any significance, under the circumstances, and appear to have been but idle, unmeaning assertions, made openly and publicly at times and places evincing no serious intention, but in real truth excluding the idea of any purpose to execute them.

It was error to permit evidence to go to the jury even tending to connect the accused with the alleged crime until the *corpus delicti* was established by full, clear, and unequivocal proof beyond a reasonable doubt. "In cases of felonious homicide the *corpus delicti* consists of two fundamental and

Brief for appellant.

necessary facts; first, the death, and second, that it was caused by criminal agency." *Pitts' case*, 43 Miss., 472; *Sam's case*, 4 Geo. (Miss.), 347; *Stringfellow's case*, 4 Cushman (Miss.), 157. *Corpus delicti* is made up of two elements: First, of the fact that a certain result has been produced; second, of the fact that some one is criminally responsible for the result." 4 Am. & Eng. Enc. L., 309. "Circumstances to show *corpus delicti* and then to show defendant's guilt should be separately presented." 73 Am. Dec., 312; 48 Mich., 482; *State v. Flannagan*, 26 W. Va., 116. "Before presumptive evidence tending to connect prisoner with the crime can be invoked, the *corpus delicti* must be established clearly, unequivocally, and beyond a reasonable doubt." *Ryan v. Commonwealth*, Va. Ct. of App., 9 Va. L. J., 607.

The instruction given to the jury on behalf of the state was erroneous and misleading. (The instruction referred to is the one copied in the statement *supra*.)

Suppose Hammond did "make wounds on the child from which he died," that might even be true, and yet the accused not be guilty. Suppose they were made by the accused accidentally, or unintentionally, or not with any criminal intent, or not while engaged in any unlawful act, or the like, surely he would not be guilty of murder. The instruction is misleading throughout, from beginning to end, and absolutely excludes from the consideration of the jury any chance, casualty or accident by which he might have made the wounds on the child, and which might reduce the crime to manslaughter if it did not exonerate. See, as to this instruction, *Brown v. State*, 72 Miss., 95; *Burt v. State*, 72 Miss., 408; *Hemphill v. State*, 16 So. Rep., 491; *Johnson v. State*, 16 So. Rep., 494.

The court below erred in refusing the instruction asked for by the accused as to good character being sufficient to raise a doubt as to guilt. "Good character of a defendant is of itself a sufficient fact from which a reasonable doubt of guilt may arise. *People v. Kerr* (N. Y. Sup. Ct.), 6 N. Y. Sup., 674.

Brief for the state.

“Evidence of good character must be considered in all cases when it is offered, as well when the other evidence is direct as when it is circumstantial. Its weight is not confined to doubtful cases, but it may of itself create a doubt. The degree of its force is to be estimated by the attending circumstances and not by the grade of the offense.” 3 Am. & Eng. Enc. L., p. 111. The accused was entitled to the protection which a good character often alone affords, especially in a case of circumstantial evidence, and he unquestionably had the right to have the jury so informed.

Wiley N. Nash, attorney-general, for the state.

On the state's appeal: Under our statute, this court is requested to pass upon the question raised in the record, whether an indictment should be quashed for the reason that the wife of the party indicted gave material testimony before the grand jury that found the bill; the statute provides that where an exception is presented in a case, by the state, the case shall be treated as if an appeal had been formally prosecuted by the state. All questions of law, thus presented, shall be decided by the supreme court. Code 1892, § 39. The statute in regard to husband and wife testifying is code 1892, § 1739. The following authorities hold that an indictment should not be held bad because the grand jury heard improper evidence: *Thompson & Merriam on Juries*, p. 693, sec. 642, and notes 1, 2, and 3, citing *State v. Walcott*, 21 Conn., 272, 280; *State v. Boyd*, 2 Hill (S. C.), 88; *State v. Tucker*, 20 Iowa, 508; *State v. Fassett*, 16 Conn., 457, 472; *Bloomer v. State*, 3 Sneed, 66; *People v. Shoug*, 1 Abb. Pr. (N. S.), 244; *Hope v. People*, 83 N. Y., 418; *State v. Logan*, 1 Nev., 509; *Turk v. State*, 7 Ohio (Part II.), 242; *People v. Briggs*, 60 How. Pr., 17; *Steele v. State*, 1 Tex., 142, 145.

On defendant's appeal: The whole case was fairly submitted to the jury both upon the law and the facts. The court expressly stated to the jury in the first charge for appellant that

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the *corpus delicti* in this case consisted of two essential facts—the dead body, and that the death was caused by violence or some criminal agency—and that the *corpus delicti* must, in such cases, be established clearly, unequivocally, and beyond a reasonable doubt, before any evidence can be considered connecting the defendant with the crime. The assignment of error, based upon the charge asked by appellant, and refused by the court, is as follows: “Good character of a defendant is of itself a sufficient fact from which a reasonable doubt of guilt may arise,” is not well taken. This is clearly an improper charge. It is misleading, and calculated to give undue prominence to the question of character in the trial of every criminal case. In dealing with this subject, Wharton lays down the principle correctly. He says substantially: “We believe the true rule to be that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case, . . . and the court should leave it to the jury to form their own conclusions, upon the evidence, whether an individual whose character was previously unblemished, has or not committed the particular crime for which he is called upon to answer.” 1 Wharton’s *Crim. Law* (7th rev. ed.), sec. 648.

WHITFIELD, J., delivered the opinion of the court.

On the appeal of the state the question is presented as to the propriety of the action of the court in quashing the second indictment (No. 986 in the record) on the ground that the wife of the accused testified to material matters before the grand jury. And first we remark that the rule declared in this state that no inquiry can be entertained the object of which is to show that the indictment was found without the examination of any sworn witnesses (*Smith & Covin v. State*, 61 Miss., 754) would, in principle, exclude the inquiry here propounded. Four of the cases cited in *Smith & Cavin v. State*, *supra*, to

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wit: 24 Ind., 151; *United States v. Reed*, 2 Blatchford, 435; 2 Hill (S. C.), 288, and *State v. Dayton*, 3 Zab., 49, are cited by Mr. Bishop (1 Bish. Crim. Pro., sec. 872, p. 517, note 4) to sustain the proposition that "the doctrine appears to be general that the court cannot inquire into the sufficiency of the proof . . . to invalidate an indictment." And, in sec. 874, Mr. Bishop says: "The rule of evidence, familiar as to the petit jury, that the testimony of a juror will be received to sustain a verdict, but not to impeach it, applies also to the grand jury. So that the want of legal evidence to justify the finding of a bill . . . cannot be shown in this way, and no other is ordinarily practicable." Says Green, C. J., in *State v. Dayton*, *supra*: "If the position be sound that every indictment not found upon the production of legal and competent evidence before the grand jury is essentially vicious, it follows that, in all cases where the witnesses produced before the grand jury are, from any cause, legally disqualified or incompetent to testify, or when any essential link in the chain of testimony is sustained by testimony not in itself legal, the indictment cannot be sustained although there be ample competent testimony, not produced before the grand jury, to sustain the charges in the indictment." But no objection was made by the state to the testimony of the two grand jurors who were examined to overthrow the indictment. Pretermitted, however, the question as to whether the inquiry could be made, on motion to quash the indictment, the fair result of the testimony of the two witnesses is, that other competent testimony was heard by the grand jury to substantiate all that the wife testified to, and that the indictment would have been found regardless of her testimony. In this view the court erred in quashing the said indictment. 1 Bish. Crim. Pro., sec. 872.

Turning now to the appeal by the defendant, we have to repeat what we have often said, that "conscientiously" is a word of quality, and not of quantity, and ought not to be used in charges as to reasonable doubt. But in the charge complained

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of here, it was mere surplusage; for the jury are not only told that they must "conscientiously" believe, but that they must "conscientiously believe beyond a reasonable doubt," etc. The expression that "he made wounds on the child, from which he died," must be read in the light of the testimony, and, so read, could not possibly have been understood by the jury as warranting conviction, though the wounds were unintentionally made.

It is urged that the court erred in refusing this charge: "Good character of a defendant is of itself a sufficient fact from which a reasonable doubt of guilt may arise." The court had already charged the jury that the good character of a defendant was a fact they should consider, in connection with all the evidence, in determining the guilt or innocence of the defendant. The charge was properly refused. This court said in *Coleman's case*, 59 Miss., 490: "Evidence of the good character of the accused should go to the jury as any other fact, and its influence in the determination of the case should be left to the jury, without any intimation from the court as to its value. The court should not tell the jury that satisfactory evidence of the good character of the accused is, or is not, sufficient to raise a reasonable doubt of his guilt."

In *Brown v. State*, 5 So. Rep., 626, a physician was called to prove that death was caused by the blows inflicted in the whipping of the child, but declined to so testify. Nothing of that sort occurred in this case.

The law was most abundantly and liberally charged for the defendant. We find no error, and the judgment is

Affirmed.

Brief for appellants.

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208 516

MERIDIAN NATIONAL BANK ET AL. v. HOYT & BROS. CO. ET AL.

1. PRACTICE. *Filing of papers.*

Although marked filed, a paper is not filed, in the legal sense, until it has been delivered to the proper officer with the purpose that the usual steps shall be taken in reference thereto.

2. SAME. *Chancery court. Creditor's bill. Case.*

When the solicitor of the complainant in a creditor's bill hands the same, together with the exhibits contained under the same cover, to the clerk of the chancery court and causes him to mark the bill filed, and, after making a corresponding entry on his general docket, to inclose the same in a regular court wrapper, and thereupon tells the clerk, without giving any reason therefor, that he did not wish process to be immediately issued and desired to take the papers back to his office, and, in fact, then carried the papers away with him, the clerk charging him with them and refraining from issuing process, there has been no such filing of the bill, in legal contemplation, as will entitle the complainant to priority of lien, under § 503, code 1892, over another attacking creditor who, in the interval of several days preceding the return of the papers and issuance of process, has, after learning the above facts, filed a like bill and had process issued thereon.

FROM the chancery court of Lauderdale county.

HON. N. C. HILL, Chancellor.

The opinion states the case.

G. Q. Hall, for the appellants.

Was the bill, in legal contemplation, filed on May 5, 1892, or, is it true, as contended, that it was not filed until the issuance of process on May 9? The language of the statute is that the creditor "shall have a lien upon the property described, . . . from the filing of his bill, except as against *bona fide* purchasers before the service of the process upon the defendant in such bill." Code 1892, § 503. Hoyt & Bros. Co. *et al.* do not belong to the excepted class of "*bona fide* purchasers."

Brief for appellants.

In *Bacon v. Gardner*, 23 Miss., 60, and in *Christian v. O'Neal*, 46 Miss., 669, the difference is pointed out between the rule which obtains in courts of equity as to what constitutes the bringing of a suit, and in courts of law. In the former, the date of the filing of the bill marks the date of the institution of the suit; while in the latter, the date of issuance of process is the date of bringing the suit. The officer's certificate of the filing is the best evidence of such filing. *Peterson v. Taylor*, 15 Ga., 483; *Bettersen v. Budd*, 21 Ark., 580; *Engelmore v. State*, 2 Ind., 91. What would be a sufficient filing of a court paper might not be sufficient filing under registry laws, and for obvious reasons. Our later registry statutes employ language that indicates what is sufficient filing thereunder, to wit, "lodge" with the clerk and "deliver" to the clerk. Sections 2457, 2459, code of 1892. The grantee fully acquits himself of all duty imposed by law when he lodges the deed with the clerk for record. *Mangold v. Barlow*, 61 Miss., 593. The use of such terms as "lodge" with and "deliver" to the clerk in the recent statutes seems to result from the decisions of this court declaring what is sufficient to be done in order to amount to a legal filing under registry laws. As, for example, under the agricultural lien law of 1867, where the contract was not required to be recorded, but only to be enrolled, that is to say, a brief summary to be made "to guide the inquirer to the knowledge of the names of the creditor and debtor, the amount of the debt, when due, and when the contract was filed," the court held that the lodgment of a paper, or a copy thereof, in the clerk's office was necessary. *Cooper v. Frierson*, 48 Miss., 300.

Under the present statutes providing for filing and recording of a certain class of contracts, the language used is that they shall be lodged with and delivered to the clerk, there to remain until duly recorded. After a record is made of it, it may, of course, be withdrawn, which withdrawal does not defeat the former filing. But under those acts, which did not require a

Brief for appellees.

recording of the instrument, the filing was effectual only so long as the paper was left in the custody of the clerk for the inspection of the public. Such papers are the property of individuals, and may be withdrawn at pleasure, hence the necessity for the requirement that the original or a copy should be left in the clerk's office, in the one instance, or until recorded, in the other instance, for the information of all sought to be bound by anything contained therein. But court papers, when filed, become the property of the court, and not of the litigants. Every such paper is required to be marked filed, and the date of filing to be indorsed and entry thereof made in the general docket, and the style and number of the cause entered, and the papers filed in the cause are required to be kept in the same package or file, and the clerk is prohibited from suffering any paper so filed to be withdrawn save by leave of the court, and then only by retaining a copy. Code 1892, §§ 463, 634.

Whether the term withdrawal has reference to withdrawing from the files, or taking the file of papers from the clerk's office by counsel engaged in the cause for examination or other purpose, is immaterial. When the paper is once put into the possession of the clerk, and indorsed filed, and entered on his docket, as the clerk did in this case, the paper becomes the property of the court—a record of the court—which neither clerk nor court can permit to be withdrawn without retaining a copy. As to what is a sufficient filing, see, also, *Swan v. Rary*, 2 Blackf., 291; *Beebe v. Morrell*, 76 Mich., 120; *Johnson v. Cranfordsville, etc., Railroad Co.*, 11 Ind., 280.

Witherspoon & Witherspoon, for the appellees.

Our position in this case is, that appellants' bill was marked filed but never filed. There was no lodging of the paper with the clerk, nor was it such a filing of it as gave the complainant any lien upon the property. The reason of the law requiring the bill to be filed before any lien is obtained thereby, is that the lien may be public and not secret, and therefore a paper

Brief for appellees.

creating it should be in a public place selected by the law as the place where any person interested might go and examine it for himself. The meaning of the word "file," as applied to legal documents, is clearly defined by § 463, code 1892, and § 1809, code 1880, where it is provided that all papers and pleadings filed in a cause shall be kept in the same file and all the files kept in numerical order, showing that, in the sense of a statute, the filing of a paper means to put it with the other papers in the case and keep them together in the office of the clerk. But in order that there might be no mistake about the meaning of this requirement of the law, the same section further provides that the clerk shall not suffer any paper, so filed, to be withdrawn but by leave of the chancellor, and then only on retaining a copy, to be made at the cost of the party obtaining the leave. This is the law with reference to filing a bill, and we do not understand how the appellant could violate that law in every letter, could fail to have its pretended bill kept in the same file with the other papers, should fail to keep the file in numerical order, should fail to leave or lodge the paper with the clerk at all, but should keep the paper in its own possession, without obtaining the leave of the chancellor and without giving the clerk a copy of the bill, and, after all this violation of the law with reference to the filing of its bill, claim that it had filed it, and, by filing it, had obtained a superior lien. In order to obtain the creditor's lien, it was necessary that the appellant should file its bill as the law required, and, having failed to do this, its bill was never actually filed until the tenth of March, when it was returned to and lodged with the clerk, which was after appellees' lien had attached.

J. S. Ham, on the same side.

The evidence does not show such a filing of the bill of the Meridian National Bank as was necessary to create a lien upon the property of the Acme Lumber Company. No paper can be considered as filed until it has been delivered to the proper

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officer, and by him received, to be placed and kept on file in his office. See *Beebe v. Morrell*, 15 Am. St. Rep., 288, and the extended and interesting note to the case, p. 294 *et seq.*; *County Commissioners v. State*, 12 Am. St. Rep., 183, and note to pp. 189, 190.

Argued orally by *G. Q. Hall*, for appellants.

WHITFIELD, J., delivered the opinion of the court.

The question which lies at the threshold in the decision of this case is whether the bill of appellant was filed, within the contemplation of law, on May 5, 1892. The facts are these: On May 5, 1892, appellant's counsel took the bill and the exhibits in one cover to the chancery clerk, and had him indorse on the bill the word "filed," etc., and the clerk made a corresponding entry in the general docket, and prepared a regular court wrapper, and put it around the papers. But counsel immediately took the bill and exhibits back to his office, telling the clerk that he did not wish process issued then, but not giving him any reason for not issuing process. The clerk charged the counsel with the papers in his attorney's docket. The bill was kept by counsel in his office until the ninth of May, when he returned the bill, and process was issued and served on the tenth. In the meantime, on May 7, 1892, counsel for appellees took their bill to the clerk of the chancery court, and it was filed on that day, and process issued and served that day. Said counsel had, on the fifth of May, gone to the clerk's office, to see what bill, if any, had been filed, and was told a bill had been filed by counsel for appellant, and was shown the entry on the general docket, and informed that the papers were at the office of appellant's counsel. These are all the facts bearing on this question.

The code of 1892, § 463, provides that the clerk "shall not suffer any paper so filed to be withdrawn but by leave of the chancellor, and then only by retaining a copy, to be made

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at the costs of the party obtaining the leave. All the papers and pleadings filed in a cause shall be kept in the same file, and all the files kept in numerical order." In *Cooper v. Frierson*, 48 Miss., 310, in construing the clause under the agricultural lien law of 1867, "he must file the contract, or a copy thereof, in the clerk's office," the court said: "The statute is not satisfied by the indorsement on the contract that it was filed, if the creditor withdraws it, and keeps it. . . . The term 'filing' imports that the paper shall remain with the clerk as a record, subject to be inspected by those who have an interest in it, and to be certified by him as any other paper properly lodged in his office and committed to his custody. It is admitted that Frierson's contract was not, in this sense, 'filed' in the clerk's office. It follows, then, that he has no lien."

Anderson's Law Dictionary defines the noun "file" as follows: "At common law, a thread, string, or wire upon which writs or other exhibits are fastened for safe-keeping and ready reference." And the definitions of Webster's International Dictionary and the Century Dictionary are to the same effect. The verb Anderson thus defines: "To leave a paper with an officer for action or preservation;" and he adds: "In modern practice, the file is the manner adopted for preserving papers. The mode is immaterial. Such papers as are not for transcription into records are folded similarly, indorsed with a note or index of their contents, and tied up in a bundle—a file." Webster quotes Burrill, as follows: "To file a paper on the part of a party is to place it in the official custody of the clerk. To file on the part of the clerk is to indorse upon the paper the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern." Mr. Freeman, in a learned note to *Beebe v. Morrell* (Mich.), 15 Am. St. Rep., 295 (42 N. W., 1119), thus sums up: "Filing consists simply in placing the paper in the hands of the clerk, to be preserved and kept by him in his official custody as an archive or record, of which his office becomes thenceforward the only proper re-

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pository; and it is his duty, when the paper is thus placed in his custody, or filed with him, to indorse upon it the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern; and that is what is meant by filing the paper. But, when the law requires a party to file it, it simply means that he shall place it in the official custody of the clerk. This is all that is required of him; and, if the officer omits the duty of indorsing upon it the date of the filing, that will not prejudice the rights of the party. This seems to be universal in its application to all documents, of whatever nature, which the law requires to be filed," citing many authorities, to the following among which we especially refer: *Holman v. Chevallier*, 14 Tex., 339; *Bishop v. Cook*, 13 Barb., 329; *Phillips v. Beene's Admr.*, 38 Ala., 251.

In *Pfirrmann v. Henkel*, 1 Ill. App., 145, cited in 7 Am. & Eng. Enc. L. (1st series), 962, the case was this: "A certificate and affidavit required to be filed under a limited partnership act, were sent by a messenger to the clerk's office, and there presented for the purpose of being filed. The deputy clerk, to whom they were presented, instead of retaining them, by mistake added a certificate of the official character of the notary before whom they were acknowledged, and returned them to the messenger, by whom they were carried away. Several months afterwards they were returned to the county clerk's office and properly filed. As against a creditor whose debt accrued before the papers were returned to the clerk's office, it was held that the first presentation of them did not constitute a filing. "Filing a paper," said the court, "*ex vi termini*, means placing and leaving it among the files. The memorandum indorsed by the officer in whose custody it is placed is merely evidence of the filing, and not the filing itself."

We close the citation of authorities with the result in modern practice, as stated by Mr. Freeman in the note above referred to (page 294, vol. 15, Am. St. Rep.): "The word 'file' is

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derived from the Latin '*filum*,' signifying a thread, and its present application is evidently drawn from the ancient practice of placing papers upon a thread or wire for safe-keeping. The origin of the term clearly indicates that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the thread or wire; and accordingly, under the modern practice, the filing of a document is now generally understood to consist in placing it in the proper official custody by the party charged with the duty of filing it, and the receiving of it by the officer, to be kept on file. The most accurate definition of filing a paper is that it is its delivery to the proper officer, to be kept on file."

In *Christian v. O'Neal*, 46 Miss., 672 (a case of an attempt to enforce a mechanic's lien, in which, as in a chancery suit, the filing of the petition is the commencement of the suit), it was said: "If a petition was not on file when this or the writ of June, 1861, was issued, suit was not begun."

We have quoted thus largely from the authorities, because the determination of this point will be decisive of the case. It is clear that marking the paper "filed" is not filing it. A paper may be marked filed, and yet not be in fact filed; and a paper may be in fact filed, though not marked filed. And the entry on the general docket does not constitute filing. All these indorsements of the clerk are evidence, but not conclusive evidence, of a filing. Whatever the nature of the paper, it can only be filed by delivering it to the proper officer, to be by him received and dealt with in the manner usual with the particular character of paper. If a deed, for example, or other paper required to be recorded, it must be kept by the clerk until recorded; if any paper, in respect to which a statute requires the original or a copy to be filed, the original may not be withdrawn till a copy has been filed. If a bill in chancery, it must be delivered to the clerk, to be by him received, indorsed, and dealt with in the manner usual with such bills. It must be delivered and recorded with the purpose of having process issue in due course.

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Suits in chancery begin, of course, from the filing of the bill, and at law from the issuance of process, under the code of 1857 (for present practice, see § 670, code of 1892); but just as, under code of 1857, at law, the suit is not begun, though process be issued, unless it is intended that it be served as in regular course (*Lamkin v. Nye*, 43 Miss., 252), so, in equity, the suit will not be begun unless the bill is delivered with the purpose that the usual steps shall be taken. In the one case, there is no issuance of process, and, in the other, no filing of the bill, within the meaning of the law. Clearly, there was no such filing here. The error of counsel for appellant was in supposing that merely having the bill marked "filed," and placed in a court wrapper, or docketed, without more, and with the declared purpose that the process should not issue, would constitute filing, because of the rule that in chancery the suit is begun by the filing of the bill. But the filing meant, as we have shown, must be a filing in the legal sense, with the purpose that process and all usual steps shall follow in due course. *Lamkin v. Nye*, 43 Miss., 252, explains the principle. It is not necessary to decide whether the provision in our statute against withdrawing papers (§ 463, code 1892) means to prohibit the taking out of a pleading by counsel for examination, except on the terms named in the statute, or whether withdrawal means permanent withdrawal from the files.

It is doubtless true, as suggested by learned counsel, that it is the custom for attorneys to take out pleadings, giving their receipt, and usually no question would arise, as the instances are rare in which the priority of a lien is determined by the filing of a particular pleading. But we desire to be understood as deciding nothing on this precise point, resting our decision in this case on its own facts. We cannot hold that what was done with this bill constituted a filing of it, under the general rule as to the filing of pleadings, nor under the terms of this statute, without deciding that the mere marking upon a pleading of the word "filed," etc., and a docket entry thereof, and

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a placing momentarily of the bill in a court file, without more, in a cover, where it was at once handed back and taken away, and kept away until another bill had been filed regularly, with the direction not to issue process added, constitute filing; and this, manifestly, is in the face of all principle and of all the authorities. We have gone carefully through all the questions in the case, but it is unnecessary, in the view we have taken, to remark upon them.

Affirmed.

J. M. EVANS v. SOUTHERN RAILWAY CO.

1. CERTIORARI. *Justice of the peace. Practice. Code 1892, § 89.*

Under § 89, code 1892, upon certiorari from the judgment of a justice of the peace, the circuit court, finding error in the record, should award a trial *de novo*, unless it be apparent of record what final judgment, as an entirety, the justice's court should have rendered.

2. SAME. *Value of property not appearing.*

In such case, the justice's record showing a judgment for the plaintiff by default in an action of trespass to property, and not showing the value of the property, upon reversal, a trial *de novo* should have been awarded.

3. SAME. *Process. Amendment of return.*

In such case, the return of the officer upon a summons may be amended in the circuit court after reversal of the justice's judgment.

FROM the circuit court of Tallahatchie county.

HON. F. A. MONTGOMERY, Judge.

J. M. Evans sued the Southern Railway Company before a justice of the peace of Tallahatchie county, claiming damages for the negligent killing of a mule by the cars of said company. The summons was returned "executed," and, on its return day, December 24, 1895, a judgment by default, without proof of value, was rendered by the justice of the peace in plaintiff's favor for the full sum demanded in the suit. The defendant

74	230
80	686
74	230
191	272

Brief for appellant.

petitioned for and obtained a writ of certiorari, and brought the proceedings for review into the circuit court. When the case came to hearing in the circuit court, the plaintiff moved for leave to have the officer who served the summons amend his return so as to show a proper and a personal service. This motion was twice made—first, when the case was reached upon the docket and before any judgment was announced by the circuit court, and again after the circuit court had found error in the justice record. It was overruled as often as made. The circuit court having adjudged the justice proceedings erroneous, the plaintiff demanded a trial *de novo*, but this was denied, and a final judgment was rendered for the defendant. Plaintiff appealed.

Eskridge & Dinkins, for appellant.

Under § 89, code 1892, plaintiff was entitled to a hearing on the merits of his case. The return of “executed” on the writ issued by the justice of the peace, made by the constable, certainly did not authorize a judgment by default against the defendant at the return term, and the trial judge was warranted in reversing the judgment rendered by the justice court. But, instead of stopping at a reversal, he should have ordered or granted, on the application of the plaintiff, a trial *de novo*. This, we think, is the course contemplated and directed by the statute. Certainly the statute did not mean that, under this writ, the circuit court was confined to an affirmance or simple reversal of a judgment rendered by a justice of the peace, and, in this summary mode, fritter away the rights of litigants on errors and blunders committed by justice courts, which are notorious for their ignorance not only of the law, but as to the proper mode of executing and returning legal process.

In the case at bar it is shown by the record that the plaintiff had at least a *prima facie* case on the merits against the defendant, but, on account of the ignorance of both the con-

Brief for appellant.

stable and justice, an improper and reversible judgment was rendered by default against the defendant. Was it not arrant wrong and injustice to deny a hearing on the merits in such case in the court below? We think we are sustained in the above views by the language of the statute. It is as follows: "Or may then try the case anew on its merits, or may, in proper cases, enter judgment on the certiorari or appeal bond, and shall, when justice requires it, award restitution." Under this language we think the reversal of the judgment of the justice by the circuit court was proper, but that it then became the duty of the court to order or to allow the cause to be tried on its merits, and refusing to do so was error, which entitles the appellant to a reversal of the judgment by this court.

We apprehend that the proper construction of the language of the statute when it says "and may, in proper cases, enter judgment on the certiorari or appeal bond," only means that when the record discloses such a case as can be disposed of by the court on the merits, it will render a judgment without awarding a trial *de novo*. We see no necessity to refer to authority beyond the section, 89 of the code of 1892, to which we specially call the attention of the court.

Coleman & Somerville, on same side.

Under § 89, code 1892, three courses may be pursued. (1) The judgment of the justice court may be simply affirmed, in which event "the same judgment shall be given as on appeals;" (2) the judgment of the justice court may be reversed, and the "circuit court shall enter up such judgment as the justice ought to have entered, if the same be apparent;" or (3) the circuit court may, upon reversal, "then try the cause anew on its merits."

It is conceded in this cause that the judgment of the justice should have been reversed, as it appears from said judgment that there was no legal ascertainment of the value of the animal killed, upon which to predicate the judgment final. Then, was

Brief for appellee.

it apparent what judgment the justice should have rendered? We think so. There should have been a judgment by default, and an ascertainment by legal evidence of the value of the animal killed; and the judgment of the circuit court should have been a judgment by default against defendant, and the awarding of a writ of inquiry.

The court below was led into error by a too literal construction of that portion of § 89, code 1892, which reads: "And in any cause so removed by certiorari, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings." Certainly this paragraph means that in determining whether or not the writ shall be maintained or dismissed, whether or not the judgment shall be affirmed or reversed, "the court shall be confined," etc.; for otherwise, the further provision, "or may then try the cause anew on its merits," would be meaningless, as no cause could be tried "anew on its merits" if in that trial the court were "confined to the examination of questions of law arising or appearing on the face of the record and proceedings." In no other way can § 89 be construed, whether by the logic of common sense or by the formulated canons of construction.

In the case at bar we urge that the circuit court should have rendered judgment by default against appellee, and should have awarded writ of inquiry, and we ask for a reversal, with direction to the court below to enter such judgment.

Yerger & Percy, for appellee.

This cause must turn upon the construction of § 89 of the annotated code. In cases where the judgment of the lower court is reversed, and it is not apparent what judgment the justice ought to have rendered, "may the court then try the cause anew on its merits," or must it do so? We see no reason for distorting the plain verbiage of the section by the latter construction. *Ita lex scripta est*, and no imperative reason requires it to be otherwise construed.

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WHITFIELD, J., delivered the opinion of the court.

The court below, upon reversing the judgment, should then have proceeded to "try the cause anew on its merits," allowing the amendments asked. We do not think it would have been proper to render a judgment by default in the circuit court, cutting the defendant off from contesting liability. Negligence was the gist of the action. *Railroad Co. v. Fort*, 44 Miss., 423. The statute (code 1892, § 89) means that if the circuit court could see, from the record and proceedings alone, what final judgment, as an entirety, the justice should have rendered, that judgment shall be entered up by the circuit court; but there was nothing in the record or proceedings alone from which the circuit court could see what final judgment should have been rendered by the justice of the peace. When, on reversal, it is apparent what final judgment the justice should have entered, from the record and the proceedings alone, the circuit court should enter that judgment; such judgment not being interlocutory merely, but disposing of the case. But that was not the case here. There had been no proof of value, and if there is to be any judgment rendered at all by the circuit court upon reversal, other than such as could be rendered on an inspection of the record and proceedings, then there must be a trial "anew on the merits"—on the whole merits—liability and value in this case. The court below should proceed with the trial. See, also, 4 Enc. Pl. & Prac., 298, 299, 303, 305; *Perry v. Rohde*, 20 Tex., 729.

Reversed and remanded.

Brief for appellants.

L. L. PEARSON ET AL. v. S. R. KENDRICK ET AL.

1. CHANCERY COURT. *Receiver. Appointment. Notice. Code 1892, §§ 574, 922.*

When a receiver has been appointed, without notice to the adverse party, by a chancellor other than the one in whose district the cause is pending, it will be presumed, on a recital to that effect in the chancellor's order, that the showing necessary to authorize such action under §§ 574, 922, code 1892, was made by the complainant.

2. SAME. *Decree discharging receiver. Appeal therefrom. Code 1892, § 575.*

An appeal lies from a decree discharging a receiver appointed without notice on the *ex parte* application of the complainant, since the latter, on the revocation of the appointment, is liable on his bond, given under § 575, code 1892, for all damages sustained by reason of the appointment. *Hanon v. Well*, 69 Miss., 476, distinguished.

3. DEED OF TRUST. *Rights of beneficiary. Precarious security. Case.*

The beneficiary in a deed of trust upon property subject to prior liens, that affords but a precarious security for his debt, and is all that the debtor owns, is entitled to have a receiver appointed of the rents and profits to the same extent as if his incumbrance were a mortgage; and it is error to discharge a receiver, on defendant's motion, before final hearing, when the evidence adduced shows such a state of case. *McDonald v. Vinson*, 56 Miss., 497, cited.

FROM the chancery court of Bolivar county.

HON. A. H. LONGINO, Chancellor.

The opinion states the case.

Moore & Clark and *Brame & Alexander*, for the appellants.

1. The right of the beneficiary of a deed of trust to foreclose *in pais* in nowise prejudices his right to do so in equity, and his rights to a receiver *pendente lite* is coextensive with that of a mortgagee, when the property is insufficient to pay the debt and the incumbrancer is insolvent. *Phillips v. Eiland*, 52

Brief for appellants.

Miss., 721; *Myers v. Estill*, 48 *Ib.*, 372. The rule is the same whether the incumbrance be a mortgage, a trust deed, or a vendor's lien.

2. A decree discharging a receiver appointed under §§ 574, 575, code 1892, is clearly appealable, for, upon a revocation of the appointment, the complainant becomes at once liable on the bond required by the latter section for all damages resulting to the defendant from the appointment, and, no matter how erroneous the decree of discharge may have been, he would be remediless if denied the right of appeal. The case of *Hanon v. Weil*, 69 Miss., 476, which apparently conflicts with this view, rests upon the different provisions of the code of 1880, under which the discharge of the receiver and his compliance with the order relieved him on his bond as receiver of all liability, and therefore a restoration of the property completely restored the *status quo*, and no one could appeal. Under §§ 576, 578, code of 1892, the giving of a preliminary bond to secure the appointment is assimilated in some measure to the matter of a preliminary injunction. The judge, in one case as in the other, may look to the averments of the bill, and, if he thinks it a proper case, may award the injunction in the one case or grant the receivership in the other, without notice, but upon the execution of a sufficient bond conditioned as the law requires. The court, by § 578, is also authorized to take from the defendant a bond in lieu of appointing a receiver in the first instance. This right the court had in the absence of a statute, but the section further provides that, in cases where complainant has given a bond, and thus incurred liability for damages, the court may still, on an application to remove the receiver, remove him upon the execution and filing of such bond. These are radical changes in the law, and affect not only the remedy or procedure, but give the parties substantial rights. Formerly the receiver was an arm of the court, which appointed or removed him at will, but now, for the protection of the defendant who had no notice, complainant must give

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bond, and, if the receiver is discharged, he becomes liable thereon for damages, to be awarded either in that suit or an independent suit.

Butt & Butt, for the appellees.

1. The decree discharging the receiver is not one from which an appeal lies. *Hanon v. Weil*, 69 Miss., 476; code 1892, § 34; code 1880, § 2311.

2. The receiver was properly discharged; indeed, he should never have been appointed. The record shows nothing in the way of affidavits, etc., to satisfy the mind of the chancellor who made the appointment that an immediate appointment was necessary or that any cause existed for not giving notice. The beneficiary of a deed of trust upon land has not the right to a receiver of the rents and profits that is recognized in mortgages upon the insolvency of the debtor and the insufficiency of the property as a security. Counsel also discussed at length the evidence touching the state of accounts between the parties, and cited the following authorities: High on Receivers, §§ 12, 17, 19, 24, 35, 108, 111, 112, 113, 115, 553, 555, 590, 600, 639, 824; *Whitehead v. Wooten*, 43 Miss., 523 (20 Am. & Eng. Enc. L., 18, and notes); *Meridian, etc., Co. v. Paper Co.*, 70 Miss., 695.

Argued orally by *C. H. Alexander*, for the appellants.

STOCKDALE, J., delivered the opinion of the court.

This cause is here on appeal from the decree of the chancery court of Bolivar county, rendered on September 18, 1896, discharging the receiver, C. T. Bell, theretofore appointed in this cause. Complainants, J. T. Wright, trustee, L. D. Nickles, trustee, and Leland L. Pearson exhibited their sworn bill of complaint in the chancery court of Bolivar county, on August 11, 1896, setting forth that on January 27, 1891, defendants, S. R. Kendricks, and his wife, Char-

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lotte Kendricks, executed their joint note of that date, payable to Burbridge & Houston, on December 1, 1891, for \$3,075, with interest from date at 10 per centum per annum, and secured it by deed of trust to J. T. Wright, trustee, on 160 acres of land and three mules and a wagon and crop of that year—said deed of trust reciting that Burbridge & Houston were to furnish defendants supplies during that year; that on March 5, 1892, defendants executed another note, for \$1,018.89, payable to the order of Burbridge & Houston, November 1, 1892, with 10 per centum per annum interest from March 1, 1892, and secured it, as well as the first note of \$3,075, mentioned in the former deed of trust, making this second deed secure a debt, evidenced by said two notes, of \$4,093.84. This deed conveyed the same property as the former deed. That on April 7, 1894, defendants executed a third note, payable to the order of Burbridge & Houston, on November 1, 1894, with 10 per cent. interest from April 1, 1894, for \$1,888.65, and secured same by deed of trust to L. D. Nickles, trustee, conveying same land as the other two deeds, and two other mules and a gin stand, and Burbridge & Houston agreeing to furnish defendants supplies during 1894. The bill alleges that all these notes were regularly transferred to complainant, Leland L. Pearson, and he was the owner, and no part of them, or either of them, had been paid, but the whole sum was due him—about \$6,000. The bill also alleges that defendants are collecting rents and disposing of them, and are insolvent, and letting the lands go to waste, etc., and that the value of the property is not more than \$3,250, and wholly inadequate to pay the debt, and prays for a foreclosure and a receiver. The answer of defendants, also sworn to, though not regularly filed in the cause, was offered and read in evidence, with other proofs, on the hearing of said motion to discharge the receiver, and filed in the cause immediately after said hearing. It denies seriatim all the material allegations of the bill. Admitting the execution of the three several promis-

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sory notes, it denies, with emphasis, that the \$3,075 note of January 27, 1891, ever had any legal or equitable existence, but was obtained by fraud, and without consideration; alleges that the second and third notes were fully paid long before any transfer of them was made to anyone; denies that Pearson is the owner of said notes; denies insolvency; denies that any waste is being allowed; denies collecting and misapplying rents; and denies selling cotton, except one bale, to pay a debt and repair the gin. The record shows that complainants notified defendants to appear at Greenville, Washington county, on August 24, to contest a motion before the honorable chancellor, A. H. Longino, of the seventh district; and the next thing that appears in the record is an order appointing C. T. Bell receiver, by Chancellor B. T. Kimbrough, of the third district, at Batesville, said to be 200 miles from Bolivar county courthouse, on August 25, 1896, without any notice to defendants, authorizing said receiver to take possession of all the property, real and personal, described in the bill—complainants having first given bond in substantial compliance with § 575 of the code of 1892. On the hearing of the said motion to discharge receiver, by agreement of counsel on both sides, it was admitted, for the purposes of that hearing, that complainant, Pearson, was the legal owner of the deeds of trust and notes in controversy, and that certain affidavits and proofs be introduced and read. The defendants in the bill introduced their own affidavit, setting forth that they owed nothing on said notes, the same being void; deny insolvency; deny that they are collecting and misapplying rents, or putting them or cotton out of the reach of creditors; deny mismanagement, and assert that they are improving the land; say they had not and have not attempted to collect rents; and deny all the equities of the bill. By affidavit of Robert Webley they prove that they have greatly improved the land. Complainants introduced the affidavit of complainants Pearson and Nickles, and that of R. P. Houston, one of the firm of Burbridge & Houston. Pearson

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reasserts the allegations of the bill, and asserts that the amount of all three of said notes, about \$6,000, is due him. R. P. Houston swears that the \$3,075 note of January 27, 1891, was to secure an old debt of \$2,700, and the balance to secure supplies to be furnished defendants during the year 1891. He says, also, that the balance unpaid on said note, for \$1,018.84, of March 5, 1892, was merged in the \$1,888.65 note of April 7, 1894, and was thereby extinguished, and delivered to S. R. Kendrick and wife. The answer of defendants to the bill was in evidence. The honorable chancellor, upon consideration of the proofs, papers, and affidavits on file in said cause, decreed that the receiver be discharged; and complainants appeal from that order.

Appellees move to dismiss the appeal, assigning causes: (1) This court has no jurisdiction of the appeal; (2) the court below had no jurisdiction to grant the appeal, citing code 1892, § 34; (3) because the appeal was improvidently granted. In support of the motion, counsel for appellees insist that an appeal does not lie from an order discharging a receiver by the chancery court, citing *Hanon v. Weil*, 69 Miss., 476 (13 South., 878), in which it is held that "an appeal does not lie from an order of a chancellor vacating the appointment of a receiver, absolutely or conditionally, and directing a return of property to the person from whom it was taken."

There is no question about that decision being the correct enunciation of the law as it then was, and still is, unless it has been changed by the code of 1892. That decision was rendered when the code of 1880 was in force, which contained no abridgment of or change in the general law in this regard. The appointment and discharge of receivers was wholly within the discretion of the court, and therefore appeals were denied. It is laid down in 20 Am. & Eng. Enc. L., 104, that the doctrine of denial of appeals seems to be based on the idea that the appointment of a receiver, ordinarily, neither settles nor prejudices rights, but is resorted to merely for the purpose of pre-

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serving the property in controversy, pending the litigation, for the benefit of the successful party. Many of the states have changed that rule by enactment, and it is now to be determined whether Mississippi has done the same. A review of the authorities cited by appellees on this feature of the case shows, what is conceded, that the courts are and always have been, averse to appointing receivers on *ex parte* showing and without notice, but our statute specially provides that that may be done in certain cases.

A receiver, then, being simply an arm of the court, by which it reaches out to accomplish its will, might be appointed and discharged at the will of the chancellor. But the code of 1892 puts a condition on the appointment of a receiver in emergency cases, where such haste is required as to preclude the giving of notice, by § 575, which is in these words: "Before any receiver shall be appointed without notice, the party applying for the appointment shall execute bond, payable to the adverse party, in a sufficient penalty to be fixed by the court or chancellor, with sufficient sureties, conditioned to pay all damages that may be sustained by the appointment of such receiver in case the appointment be revoked, and said bond shall be filed in the cause, and damages may be recovered thereon in suit in the same manner as damages are recoverable on an injunction bond, or the party entitled to damages may maintain an independent suit on such bond therefor." Section 576 prohibits the chancellor or court from removing a receiver without notice to the opposite party and the receiver, no matter when he was appointed. Section 578 authorizes the court or chancellor to substitute a bond in place of appointing a receiver, or remove him upon the execution, approving, and filing of a similar bond. The legislature must have had an object in making these changes in chancery proceedings, and the duty of the courts is to ascertain the legislative will and follow it. Section 575 provides a remedy, so that the party who resorts to the hasty *ex parte* proceeding to procure an appointment of a re-

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ceiver shall not escape liability, as formerly, for damages inflicted upon the opposing party, in case his action should be held to be unauthorized by the facts and wrong, but must guarantee indemnity by the bond there described.

The court held, in *Hanon v. Weil*, that the change of possession of property was not within the contemplation of § 2311 of the code of 1880, but merely a restoration of the *status quo* as it existed before the appointment of a receiver. No person's rights were affected there, and no liability resulted from the order of the court, but the same cannot be said here. The condition of the bond is to pay damages if the appointment of the receiver be revoked. The judgment of the court here complained of revokes the appointment, which amounts to a judgment of the court that the obligor and his sureties are liable on the bond for some damages; and their rights are affected when they are brought into court on that bond. They come in burdened and prejudiced with an adjudication that they are liable on the bond, and it is claimed by appellees that very considerable damages have resulted in this case from the appointment of said receiver, and they ought to have an appeal to this court to show, if they can, error in the judgment that fixed a liability upon them. Section 575 itself, by giving to this bond the same status as to remedies upon it as is given to injunction bonds, evidently contemplates that an appeal may be had from the order of discharge. The motion to dismiss the appeal, therefore, is denied, and the order of the honorable chancellor of the seventh district, the Hon. A. H. Longino, discharging the receiver, is here for consideration.

Counsel for appellees insist that the order appointing the receiver was irregular, the appointing power not having acquired jurisdiction, and should not have been made, and was properly revoked. It is urged that the order appointing a receiver, made at Batesville, in the third district, on August 25, 1896, purports on its face to be the action of the chancery court of Panola county, which court had no jurisdiction of the

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subject-matter, and that the showing made was not sufficient to give a chancellor of another district jurisdiction, and not sufficient to warrant the appointment of a receiver in any event. The order appointing the receiver, which is the only authority by which C. T. Bell claims to be receiver, in its caption and recitals, indicates action in and by the chancery court of Panola county. It is also recited, in the body of the order, that the action is in a certain cause pending in the Chancery court of Bolivar county, Miss., giving number and style of the case, and that the Hon. A. H. Longino, chancellor of the seventh judicial district, is seriously ill at Jackson, Miss., and absent from his district, and complainants' bill was before him. The order is signed, "B. T. Kimbrough, Chancellor of the Third District," from which it sufficiently appears that the order was the action of the chancellor of the third district. Section 922 authorizes the chancellors of districts other than where the suit is pending to act, and § 574 authorizes the appointment without notice, and we must presume the honorable chancellor of the third district had before him sufficient showing, in his opinion, to authorize his action.

The record discloses that the motion to discharge the receiver was tried on the first of September, 1896, on proofs then submitted to the court, in addition to the papers in the cause, and on its merits, the contention being whether the cause then needed a receiver; and that is the question now before this court. Complainant Pearson maintains, by his bill of complaint and affidavit submitted on trial of this motion, that all three of the said described notes are his, and due, and no part of either of them has been paid. The defendants, appellees here, as stoutly maintain that nothing is due on any of said notes; that the note of January 27, 1891, of \$3,075 was and is void, and the other two paid. The affidavit of R. P. Houston, submitted by complainants, shows that a part of the consideration of said \$3,075 was for supplies to be afterwards furnished, and that the said note of March 5, 1892, for \$1,018.65, was,

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on a settlement with Kendrick and wife, on the seventh day of April, 1894, extinguished and delivered up to Kendrick and wife, and that no part of said third note of April 7, 1894, has been paid, except what is indorsed thereon, on the back of said note. The following is on the back of the note, to wit: "Indorsed on the within note, \$308.66, 1/1/95. B. & H."

There seems, from the record, to be some doubt cast upon the first note of \$3,075, and we express no opinion about its validity or status. There are other items in the case about which there seems to be no serious dispute; eliminating from the consideration the second note, of March 5, 1892, for \$1,018.65, extinguished and delivered up April 7, 1894. With the answer of appellees in the court below was filed an account (Exhibit A) purporting to be a statement of all the dealings between Burbridge & Houston and Kendrick and wife from January 30, 1891, to February 22, 1895, showing, as appellees claim, \$20.01 due them. That account shows to have been balanced on March 14, 1894, showing a balance against Kendrick and wife of \$1,888.65, and they are credited by that amount "by bill receivable," balance of the \$1,018.65 note entering into the debt. Then the account begins anew. The note of April 7, 1894, is for the same amount, \$1,888.65, and \$308.66 was paid on it January 1, 1895. The value of that note, at the date of the motion to discharge, was about \$2,000, after deducting payment. It is not denied that there is due on the lands in question \$477, with two years' interest, presumably at ten per cent., but, if at six per cent., the debt is over \$500, secured by vendor's lien in favor of the Louisville, New Orleans & Texas Railroad Company, making over \$2,500, besides costs, after deducting the \$20.01, balance on account. That amount may be regarded as undisputed, so far as this record shows. The property in the deeds of trust, as the record shows, is estimated at \$2,250 to \$3,250, at a fair rate.

Take the mean of those estimates, \$2,750, and it may be fairly and justly regarded as a precarious security for the debt

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of complainant. It is mentioned in defendants' answer to the bill that Connel & Gardner have a deed of trust on the crop of 1896, grown on the lands in question here—for what amount the record does not disclose; but that deed of trust is, of course, superior to appellants' claim, and appellant, Pearson, is junior incumbrancer to the Louisville, New Orleans & Texas Railroad Company for over \$500, and in the same attitude as a junior incumbrancer to Connel & Gardner as to his claim on the crop of 1896. And the application of a junior incumbrancer for the appointment of a receiver stands upon much more favorable grounds than that of first mortgagee. *Myers v. Estill*, 48 Miss., 403, and cases there cited. It was held by Justice Brewer, of the United States supreme court, in the case of *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, in the circuit court for the district of Kansas (see 36 Fed., 221), that if, looking at the situation of the litigating parties, the situation of the property, and the prospects of the future, it should appear to the court that these would be benefited, that these require the appointment of a receiver, why no court could, although it is said to be a matter resting in his discretion, justly refuse the appointment.

While the facts in the record cast some doubt upon the said \$3,075 note of 1891, not used in the above calculation, some importance is added to it by the agreement of the attorneys in the court below that, for the purpose of that motion, Pearson should be considered the legal owner of it, and it cannot be discarded from the case; and if, upon a future investigation by the honorable chancellor, it should be found that any considerable part of that note is a valid, subsisting debt, the whole debt of appellant, Pearson, largely exceeds the value of all the property of Kendrick and wife, so far as shown by the record in this case, for it is alleged, and not denied, that the property here in question is all they own, and people may be well said to be insolvent when their debts exceed the value of all their property. It is not disputed that a mortgagee is entitled to a

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receiver in foreclosure proceedings when the mortgaged property is insufficient to pay the debt and the mortgagor is personally insolvent, as laid down in *Phillips v. Eiland*, 52 Miss., 721. In that case, the chancellor refused to appoint a receiver, and, for that reason, this court, holding the showing sufficient, reversed and remanded the cause. A deed of trust is, in effect, the same sort of instrument, simply to secure a debt and enable the creditor to enforce payment. This court has, in effect, held, in *McDonald v. Vinson*, 56 Miss., 497, that a deed of trust stands on the same ground as a mortgage, as to foreclosure, if the beneficiary desires to avail himself of it. The learned Justice Campbell, in that opinion, said: "The bill shows a promissory note, secured by deed of trust, with condition broken; and that is all that is necessary to maintain it." It must follow that like circumstances will call for the appointment of a receiver as in foreclosure of a mortgage.

The allegations of the answer of defendants below that no privilege tax was paid and license had by Burbridge & Houston during the years they dealt with defendant; whether the \$3,075 note of 1891 is valid debt, whether the place is being allowed to deteriorate, and to what extent the account exhibited shall be purged of usurious and excessive charges—are all questions solely for the honorable court below to investigate and determine, and we express no opinion in reference to them. But, until those matters shall be adjudicated, and the true status of the litigating parties determined, we think, and so hold, that the facts set forth in this record present a case in which a receiver is necessary, and ought to be retained, under the direction of the chancellor or court, and with such powers as the honorable court or chancellor may give and confer, according to law, unless the honorable chancellor shall remove him, upon Kendrick and wife executing a bond as is provided for in § 578 of the code of 1892.

The judgment of the court below discharging the receiver is reversed, and the cause remanded, to be proceeded with according to the equitable principles applicable to the case.

 Brief for appellant.

W. T. RATLIFF, TAX COLLECTOR, v. AMBUS BEALE.

74	247
75	650
74	247
87	118

POLL TAX. *Distress. Nontaxable property. Section 243, constitution 1890.*

Property which is exempt from taxation cannot be distrained to coerce the payment of a poll tax due from the owner, sec. 243 of the constitution of 1890 providing that the poll tax shall be a lien only on taxable property.

FROM the chancery court, first district, of Hinds county.

HON. HENRY C. CONN, Chancellor.

The facts are fully stated in the opinion of the court.

Wiley N. Nash, Attorney-general, for appellant.

Upon the decision of this case depends (1) the amount of poll tax to be hereafter collected in this state for all time to come; (2) the construction of the lien clause in sec. 243 of the state constitution; (3) whether our free public school system is to suffer by a strained construction of the instrument by which it is created. The importance of these matters to the state is so great that I do not hesitate to appear in the case, and that, too, though entertaining some doubt as to whether or not it is my official duty to do so.

The bill claims that, under a clause in sec. 243 of the state constitution, no property which is exempt from taxation can be seized or charged in any manner for the payment of the poll tax, the particular clause being "said tax (*i. e.*, poll tax) to be a lien only on taxable property."

Over one hundred years ago, in England, it was said by a full court, "that the sheriff, by the levying of goods by *fiere facias*, as he seizes the goods, gets a property in the goods against all persons," etc. *Clerk v. Withers*, 6 Modern Reports, 298.

So it is evident that in the seizure of the goods, in the case at bar, the sheriff did not get a lien, but more than a lien. He got a property in the goods, to be divested only upon payment

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of the poll tax and all legal costs and charges. Whenever the sheriff or other officer makes a valid levy, seizure or distraint of goods, he has a vested right, a legal property, in such goods. This property is acquired under the law and by the valid levy, seizure or distraint, and the property becomes re-vested in the general or original owner only when the demand, the execution or other process, is satisfied. In cases of levy, seizure or distraint of property, the sheriff or other officer asserts title to the property under the process or mode of proceeding. By taking the property under the levy, seizure or distress, the officer acquires a certain special legal property in and to the goods so levied, seized or distrained, which property or title holds good until the satisfaction of the particular debt, charge, demand or claim.

If the framers of the present constitution intended, that, for the payment of the poll tax, nontaxable property should be liable to no process whatever, why, in the name of common sense, did they not say so? What language does the code use in reference to personal property exempt? This is the language used: "The following property shall be exempt from seizure under execution or attachment, to wit," etc. Code 1892, § 1963. What uncertainty is there here? Is there any mistaking of this language? What is the language used by the legislature in regard to homestead exemptions? It is this: "Every citizen of this state, male or female, being a householder and having a family, shall be entitled to hold, exempt from seizure or sale under execution or attachment," etc. Code 1892, § 1970. There is nothing uncertain about this—there is no mistaking such language. In these two sections, 1970 and 1963, the legislature said there was some virtue in the words "seizure and sale." In the one case the law says certain property shall not, and in the other that it shall, be sold.

It does seem that if it had been intended in § 243 of the constitution to exempt all nontaxable property from distraint,

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seizure or sale for the nonpayment of the poll tax, the framers thereof would have used the same or similar language to that used to exempt personal property and the homestead from seizure or sale under execution or attachment. It could have been done in the same number of words.

The public policy proposition of appellee's counsel can be answered conclusively by saying to those who contend that every effort should be made to uphold in every possible way the franchise scheme as announced in the new constitution, that every effort should be made to uphold in every possible way the free public school system as announced in the new constitution. Admitting that both are equally important, then certainly the court will not, by a construction, and a strained construction, pull down one to build up the other. Placing both on flat-footed equality, then the meaning of the word lien, used in § 243 of the new constitution, will not be enlarged, but will be considered in its ordinary, primary, and obvious sense.

Where the constitution is not entirely explicit within itself, it ought not to be so construed as to cripple the government and render it unequal to the objects for which it was instituted. Chief Justice Sharkey, in *Smith v. Halfacre*, 6 Howard, 600, citing 9 Wheat., 1; *Leachman v. Musgrove*, 45 M., 511.

We cannot say too much in behalf of our schools. Mississippi—the people of Mississippi—cannot do too much in their behalf. Through them, up to this good hour, much has been accomplished—much that ennobles and elevates the human race. By these in this country, in a large measure, are to be drilled and mustered those forces with which is to be fought, in the years to come, every moral, social, political and religious conflict.

In conclusion, and without recapitulation, it is believed that this court, in view of the facts, the law and the constitution, and after considering the case fully and in all its phases, will reverse the decree and judgment of the court below, sustain the motion to dissolve the injunction and dismiss the bill.

Brief for appellant.

J. A. P. Campbell, on same side.

The real question is as to the meaning of the clause in sec. 243 of the constitution, in these words: "Said tax to be a lien only upon taxable property." In what sense was the word "lien" used? Was it in the sense of liability or right to resort to it as means of payment? This is repelled by the fact that the poll tax was imposed by the constitution "in aid of the common schools," and, in order to be an aid, it must be collected; and it is not to be charged that the convention falsely pretended to be aiding common schools, when at the same time it was scheming to prevent this aid, by providing against the collection of the poll tax; that it professed a purpose to aid the common schools, but this was a mere pretense, and the poll tax was not to be enforced as to the very large majority of those subject to it. The prohibition of criminal proceedings to collect poll tax strongly suggests the admissibility of civil proceedings, and can it be that it was intended that the vast majority liable should escape payment? Is the constitution as to this a sham and fraud, professing one thing and intending another? Is the grant to boards of supervisors of power to increase the poll tax by one dollar, to aid the common schools of their counties, of like delusive character? That tax is not subject to the provision as to lien.

Can it be that it is a part of the constitutional plan to exclude negroes from the ballot box, to make the poll tax uncollectible, and yet put it in the power of the legislature to thwart the plan by making all property taxable, when no question as to a lien would arise? The convention refused to commit to the legislature any power over the matter of establishing and maintaining common schools. It provided for them and their support, and levied a poll tax, as part of the means of their support, and, if it was not guilty of deception and double dealing, the poll tax was meant to be collected. The tax is upon the person—it could not be a lien on him—and were it a lien on nontaxable property, it would fetter exchanges and produce

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embarrassment as to the transfer of articles not taxable, which, if subject to a charge, would, for purposes of transfer, be reduced in value.

The constitution was made in the midst of existing institutions and in view of a body of statute law relating to many things, and, among them, to taxation. For a long time it had been provided by statute, in force when the constitution was made, that "taxes assessed shall be a lien upon and bind the property assessed from the first day of February," etc., and it must have been in view of this and to limit this lien or charge to tax the property that the clause was adopted. The term lien was used, not in any general or loose and unusual sense, as argued, but in its usual sense, and in the sense well understood from long usage and existing statutes on the subject of taxes and their collection. Our statutes not only made taxes on property a lien, but declared that no property should be exempt from distress and sale for taxes. If it was the purpose of the convention to free nontaxable property from liability for poll taxes in civil proceedings, why was it not so said? Why employ an equivocal expression? Why leave the matter in doubt? Is it not manifest that it is an afterthought to seek to use the clause under consideration as a deep-laid scheme to fool the public and exclude negroes from voting? It will not do to interpret the constitution by its practical operation as to this.

One thing is certain, if schools are to be aided, the poll tax is to be collected; and if nontaxable property is not liable, the tax is a sham and delusion, for probably nine-tenths of those liable to poll tax will escape payment. They who pay taxes on property will be the only persons paying poll tax, and the vast majority of heads of families will escape payment of poll tax, almost the only tax by which they can be made to contribute to the enormous burden of educating their children. A lien is a tie that binds property, such hold upon it that it cannot be disposed of except subject to the claim. Anderson's

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Law Dictionary; *Anderson v. State*, 23 Miss., 459; *Morgan v. Campbell*, 22 Wallace, 390. The average member of the constitutional convention must have understood the term lien as used in our jurisprudence. Can it be that the poll tax was imposed to exclude negroes from voting? The constitution says it was to aid common schools. Is that a lie? We copied from Massachusetts's constitution. Was that to exclude negroes? Who shall say it was more desired to exclude from voting than to maintain schools?

It must be assumed by the court, I think, that the poll tax was imposed in good faith for the purpose stated by the constitution, and was intended to be collected, and that exclusion from voting, as a consequence of nonpayment of all taxes (poll tax included), was intended quite as much to secure payment as to exclude from the ballot box. Like a tariff for revenue with incidental protection, and not for protection as its chief aim, exclusion from voting may have been looked to as likely to occur in many instances from default in payment of taxes, but that would be puerile as a remedy for the evils of an unsatisfactory body of electors. Let the negro feel an interest in elections, and he will as surely pay his taxes as he will raise money to go to a circus, and, if he did not, campaign funds would pay for him if his vote was looked to.

If it was the purpose of the convention to prohibit resort by civil proceedings to property not taxable for collection of poll tax, why did it not say so in plain language? Why not say the payment of poll tax shall be voluntary, or optional with the person liable? Why not say, no civil or criminal proceedings shall be allowable to collect it? If it be answered that this was not done because it would have freed solvent men from paying, we must then convict the convention of fraud and deception, in pretending to aid common schools by a poll tax intended not to be collected from the overwhelming majority of those on whom it was solemnly imposed to aid common schools. More than this, the constitution provides for main-

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taining common schools at least four months in each year, and poll taxes are devoted to the purpose, and relied on as the means of support for schools, to be supplemented (helped out) by an appropriation from the state treasury. Manifestly, it was contemplated that common schools would be supported, in large part, by poll taxes (and they should be, and would be, if they were paid), and yet for years past the annual appropriation from the state treasury for the maintenance of common schools has been \$923,500.

The journal of the constitutional convention shows that there was much controversy over \$400,000 as a sum to be annually appropriated from the state treasury for common schools, and yet we have largely more than twice that sum annually appropriated, made necessary, in large part, by the uncollected poll tax imposed by the constitution. There is little doubt that the provision requiring the legislature to appropriate enough to supply the failure of the poll tax to maintain schools four months each year would never have become part of the constitution but for the imposition of the poll tax, and the promise that that would supply a large part of the means to maintain the schools the required time. And now we are told the poll tax was never intended to be paid, except voluntarily by the vast majority of those on whom it was imposed. The result is, that but a comparatively small part of the poll tax is collected, and almost a million of dollars must be annually supplied to make up the deficiency. No wonder the treasury is empty, with bonds sold and taxes increased.

The convention did not have reference to common law liens, for they were connected with and dependent on possession. They had no connection with taxes. Equitable and maritime liens were not in the mind of the convention certainly, for they were wholly inappropriate. Statutory liens must have been in view, and, bearing that in mind, there is no difficulty in concluding that "lien" was used in the sense in which it is used in the revenue law in force when the constitution was adopted.

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The convention was dealing with revenue and providing for a school fund (to be added to as far as necessary by appropriation from the state treasury) by poll tax, and it must be convicted of folly (or deception, if it was contriving how the tax should not be collected) if it be concluded that it prohibited liability of nontaxable property for poll tax.

Frank Johnston, for appellee.

Section 243 is a part of the franchise article of the constitution of 1890. It levies a poll tax on male inhabitants, with enumerated exceptions, and provides that "said tax shall be a lien only upon taxable property," and "no criminal proceedings shall be allowed to enforce the collection of the poll tax." Upon the construction of the franchise article of the constitution the proposition which I submit to the court is that property exempt from taxation cannot be subjected in any manner to the payment of the poll tax.

The constitution must be construed to exempt nontaxable property from the payment, both upon a technical construction of its terms and upon a broader interpretation of its suffrage scheme, the purpose of these constitutional provisions in relation to the elective franchise to be ascertained and interpreted in the light of the condition of public affairs existing at the time of the adoption of the constitution. The state emerged in 1875, by a *quasi* revolution, from the rule imposed by the reconstruction acts of congress. With a large negro majority, elections were accompanied by disorders and race conflicts until the adoption of the present constitution. It is a part of the history of the state that the purpose of the legislature in calling the constitutional convention was to provide, within the limits of constitutional power, a scheme of suffrage that would secure an electoral body in the state from which the elements of ignorance and incompetency should be, as far as practicable, excluded. The debates in the convention disclose this as the primary and fundamental purpose of that body, and this was,

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beyond all comparison, its most important and serious work. This explains the existence of these unusual provisions in the organic law.

The constitutional limitations on suffrage are an educational qualification, residence in the election precinct, and the payment of all taxes, including the poll tax, prior to the first day of February of the year of the election, for the two preceding years. It was supposed by the framers of the constitution that all these limitations, operating together, would accomplish the object in view. The design, in making the payment of the poll tax a qualification of the elective franchise, and then exempting nontaxable property from its payment, was to leave payment optional with that large class of voters who owned no taxable property, as an inducement to them not to vote. These considerations make it clear that the convention used the word "lien" in its broadest and most comprehensive signification, and did not limit the prohibition to a statutory lien, and the intention was to exempt nontaxable property entirely from the payment of the poll tax. It is used in the same sense as the terms "charge," "subjected to," or "answerable for," and the like, and this accords with the correct and technical definition of the word. *Sullivan v. Railroad Co.*, 4 Cliff., 225; *Hardy v. Norfolk Mfg. Co.*, 80 Va., 418; 2 Bouvier Law Dict., 47; 3 Parsons Contracts, 234; 13 Am. & Eng. Enc. L., 575, 603; *Ridgely v. Inglehart*, 3 Bland's Ch., 540; *Stepham v. Catholic Bishop of Chicago*, 2 Ill. App., 249; *Anderson v. State*, 23 Miss., 459. In its broadest sense, a lien is defined as "an obligation to or claim annexed or attaching to property, without satisfying which the property cannot be demanded or retained by the owner." *Ridgely v. Inglehart*, 3 Bland Md. Ch., 540; *Stepham v. Bishop of Chicago*, 2 Bradw. Ill., 249. "A lien at law is an implied obligation whereby real or personal property is bound for the discharge of some debt or engagement." Jones on Liens, sec. 4. It is a right to hold possession of an-

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other's property for the satisfaction of some charge attached to it. 3 Parsons on Contracts, 234.

A lien exists solely for the purpose of securing payment of a debt out of particular property. It is the qualified right which may be exercised over the property of another, though it is neither a *jus ad rem* nor a *jus in re*. It may be given by statute or may arise from a levy upon the particular property. An execution lien or a judgment lien is merely "a right to satisfaction of the judgment out of the property, superior to and in preference of any adverse interests subsequently acquired." *Buckner v. Pipes*, 56 Miss., 366, 367.

A lien is an implied obligation whereby property is bound for the payment of a debt. It was used in this sense in the constitution. This provision of the constitution is therefore to be read as if it declared "that the taxable property only of the person owing a poll tax shall be bound for its payment," which is the exact equivalent of saying that his nontaxable property shall not be so bound. And, if not so bound, nontaxable property cannot be subjected to the payment of the poll tax. The constitution expressly prohibits the creation of this obligation or claim on the nontaxable property of the poll tax debtor. It declares, in effect, that he may keep or retain his nontaxable property without paying the poll tax. The full force of this reasoning will be perceived when the distinction is observed between a lien and one of the ordinary consequences that is a right to prior satisfaction out of the property on which it rests. If a lien is a prior one, it includes the right to prior satisfaction, but it is more than this. It is a claim or charge as between the state and the debtor. Where a lien exists, the taxpayer cannot retain the property without paying the tax. Where the lien is prohibited, there is absolutely nothing to prevent the taxpayer from retaining his property against the demands of the tax collector, which is but another form of saying that the nontaxable property cannot lawfully be subjected to the payment of the poll tax.

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There is a wide difference between the case of the absence of a lien on property before its seizure and a constitutional provision prohibiting the creation of a lien on certain defined property for the payment of a particular kind of tax. In the one case the debtor is under an obligation to apply all of his property which is not exempt from seizure to the discharge of his debts, and this obligation ripens into a lien when the property is levied upon, while in the other case there is no obligation whatever on the part of the taxpayer to apply the exempt property on which the creation of a lien is forbidden to the tax, for the provisions against the lien is a prohibition of any seizure of the property which would create a lien upon it.

It is conceded that the legislature is prohibited from making the poll tax a lien on nontaxable property, and the contention is that only statutory liens are prohibited by the constitution. This is fallacious, for the reason that the prohibition, by the very terms of the constitution, embraces all liens. The framers of the constitution intended that a lien could not be created by statute or by levy. The language is that the poll tax shall be "a lien only on taxable property," and the prohibition cannot, on any correct rule of construction, be restricted to one particular kind of a lien. If the purpose of the constitution had been to limit the operation of the prohibition to statutory liens, it would have so provided in express terms.

Counsel for the appellant are in error in their contention that the poll tax was placed in the constitution primarily as a means of raising revenue for the public schools. The poll taxes, it is true, when collected, become a part of the common school fund, but this wholly fails to explain the presence of the poll tax provision in the constitution. The committee on education presented a proposition to the convention to impose a poll tax for the common school fund and make its payment compulsory, a proposition which was rejected by the convention. Proceedings of the convention, pages 119-121, 122.

When it is seen that the provisions relating to the poll tax

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form a part of the suffrage scheme of the constitution, and when their effect and operation under the construction contended for in behalf of the appellee are perceived and considered, the whole purpose of the convention becomes perfectly clear and intelligible. If the purpose of the constitution was to raise revenue for the public schools by levying a poll tax, impediments would not have been placed in the way of its collection. On the contrary, the convention would have left the legislature ample powers to enforce the collection of this tax by the most effectual methods. Prior to the adoption of the present constitution, nonpayment of the poll tax was a misdemeanor and punishable as such, and its payment was thus made compulsory. This proved a most effective method of enforcing its collection. The constitution of 1890 forbids any criminal proceeding for the collection of this tax, thus effectually securing the option to that class of voters who own only exempt property of not paying the poll tax, as an inducement to them not to vote.

It is true, as argued by counsel for the appellant, that the legislature may make the payment of the poll tax, in effect, compulsory by repealing the statute which exempts certain property from taxation, but this suggestion is without force. Such legislation would be merely an indirect if not an evasive means of impairing the purpose of the constitution, and the framers of the constitution must have reasonably presumed that the legislature would not abandon the just policy of exempting certain property from taxation for the indirect and evasive purpose of collecting the poll tax.

I respectfully submit that this court will uphold and preserve in its integrity a constitutional safeguard which has brought to the people of the state the blessings of peace and repose in place of the disorders and dangers that formerly attended the operation of unlimited suffrage.

S. S. Calhoun, on same side.

The constitutional convention refused to enact the report of

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the committee on education, which report made the collection of the poll tax compulsory, and thus committed itself to the idea that the tax should not be coerced. Its purpose was to exclude ignorance from the ballot box, and not negroes.

Exemption of absolute necessities from taxation has characterized our legislation from the beginning of the state government. The convention had the right to assume, and did assume, that this humane policy would continue. Surely as long as it does continue, it protects nontaxable property from a lien.

Our supreme court had defined a lien as "not a right to a thing nor in a thing, but the right to resort to a thing for satisfaction," and the constitution says, in effect, you cannot resort to nontaxable property for satisfaction. This it says by providing that there should be no lien upon it. It was never intended that the tax collector should strip every man naked, as appellant's construction of the revenue laws would require. If the tax collector is permitted to seize nontaxable property, a lien is created thereon by every authority. This the constitution says shall not be.

Argued orally by *Attorney-general Nash* and *J. A. P. Campbell*, for the appellant, and by *Frank Johnston* and *S. S. Calhoun*, for appellee.

COOPER, C. J., delivered the opinion of the court.

The appellant, the sheriff and tax collector of Hinds county, seized an article of household furniture, which is by law exempt from taxation, to coerce the payment of a poll tax due by the appellee. The appellee thereupon sued out a writ of injunction to restrain the sale of or further proceeding against said property, and, on final hearing, the injunction was made perpetual. From that decree the tax collector appeals.

There are no controverted facts in the case. It is admitted that the tax is due and unpaid and that the proceeding is, in all respects, regular, if the property seized by the officer was subject to be taken and sold for the tax. The question involved

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is whether nontaxable property may be sold for the payment of poll taxes, and the solution of this question rests upon the construction of section 243 of our constitution, which is as follows: "A uniform poll tax of two dollars, to be used in aid of the common schools, and for no other purpose, is hereby imposed upon every male inhabitant of this state between the ages of twenty-one and sixty years, except persons who are deaf and dumb or blind or who are maimed by loss of hand or foot, said tax to be a lien only upon taxable property. The board of supervisors of any county may, for the purpose of aiding the common schools in that county, increase the poll tax in said county, but in no case shall the entire poll tax exceed, in any one year, three dollars on each poll. No criminal proceedings shall be allowed to enforce the collection of the poll tax." The question is, what is meant by that part of this section which declares "said tax to be a lien only upon taxable property," and this is determinable by the inquiry in what sense the word "lien" is employed.

For the tax collector it is contended that the word was used to designate that right or condition created and fixed by our then existing statutes, by which a charge or lien was given to the state and its counties upon all property assessed for taxes, which lien took relation back to the first day of February of the year in which the property was assessed and the tax levied, and by virtue of which the property, into whosoever hands it might come, was liable to seizure and sale. This statutory lien, it is correctly argued, did not render the property in the hands of the owner to whom it was assessed liable to seizure for taxes, for this liability arose from the facts of his ownership and the assessment of the property and the levy of the tax thereon. And so it is contended that the purpose of the constitutional provision is simply to declare that no lien shall be created upon nontaxable property which would render it liable to the poll tax of the owner after it has passed into the hands of third persons.

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For the appellee it is argued that the word "lien" is used in its broadest sense, and excludes not only the idea of a technical lien enforceable against third persons, but excludes also all right or power in the legislature or any executive officer or in any court to proceed against, to charge, or to subject non-taxable property to the payment of the poll tax. . . .

Counsel for the respective parties press upon the attention of the court, with great earnestness, those matters which, if viewed alone, would lead to the one or the other construction contended for. In our opinion, they are all of importance, and are to be considered. In construing the constitution, we are to resort to such rules as would aid in the construction of a statute, keeping always in view the fact that while statutes descend into particulars and details, constitutions deal usually in generalities, and furnish along broad lines the framework of government. In *Daily v. Swope*, 47 Miss., 367, it was said: "The constitution is a law, differing only from a statute as it is of superior and paramount force, irrepealable by the legislature, and which prescribes where it conflicts with a statute. Where the framers of the constitution employ terms which, in legislative and judicial interpretation, have received a definite meaning and application, which may be more restricted or general than where employed in other relations, it is a safe rule to give to them that signification sanctioned by the legislative and judicial use." To find the true meaning of the language of the constitution, we are to look to the existing body of the law, whether common or statutory (Endlich on Inter. Stat., sec. 520), to former constitutions (*Alleghany v. Gibson*, 90 Penn. St., 397), to existing evils, to the objects and purposes to be accomplished, and to the remedies intended to be provided (Cooley on Const. Lim., 70; *People v. Chataqua*, 43 N. Y.; Endlich on Inter. Stat., sec. 518).

We know that a large part of the property of this state has, for many years, been exempt from taxation. Since the year 1871, there has been exempt, among other things, the

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wearing apparel of all persons, provisions on hand necessary for family consumption, all farming produce raised in this state in the hands of the producer, one gun, all poultry, household furniture not to exceed in value two hundred and fifty dollars, two cows and calves, ten head of hogs, ten head of sheep or goats, colts foaled in the state under three years old, farming utensils used for agricultural purposes, . . . the tools of any mechanic necessary for carrying on his trade, the libraries of all persons, and pictures and works of art not kept or offered for sale as merchandise.”

The valuation of real and personal property for taxation, in the year 1880, was \$165,847,334. If to this be added the assessed value of railroads in the state, approximately, \$24,000,000, we have total value of taxable property, \$189,847,334. By the eleventh census of the United States the value of the agricultural products of this state for the year 1889 was given at \$73,342,995. There were in the state in that year 144,310 farms. If to each farm it be assumed that there was of all other exempt property the value of \$25, there would be \$3,607,950 to be added, making a total valuation of property exempt from taxation of \$76,950,945. Of this exempt property, probably fully one-half was in cotton, the staple agricultural product of the state, and this in the course of the year all passed out of the hands of the producer. There is great force therefore in the suggestion that the framers of the constitution did not intend to provide that one-third of the property of the state should be held as exempt from a tax imposed by the convention itself in aid of a cherished object—the common schools of the state—but only intended that the property should not be subjected after it had passed into the hands of third persons—innocent purchasers of our great staple.

But we are not to look to the existing statutes alone to determine in what sense the word “lien” was used. We are to consider the condition of things as existing at the time, and especially must we note those grave and permeating forces for

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evil which were known by all men to exist, the silent and increasing influences of which were corrupting the public conscience and threatening to involve in common ruin the morals and civilization of our race and the liberty and safety of another.

It is not the province of this court to consider with whom rested the fault which gave origin to the conditions under which the convention was assembled. We deal with those conditions only as existing facts, forming a part of the history of the times. We consider them because we are seeking to discover the sense in which an ambiguous word was employed by the convention, and because, as existing facts, they cast a light upon the question under investigation. It cannot be doubted that the question involved in the proper settlement of the electoral franchise had been the subject of more reflection and thought, for a period of many years, than were bestowed upon all other subjects as to which our constitution underwent material change. Not only in this state, but throughout our sister states, thoughtful and anxious men turned upon the solution of the question all the light to be gathered from history or speculation. Our unhappy state had passed, in rapid succession, from civil war through a period of military occupancy, followed by another in which the control of public affairs had passed to a recently enfranchised race, unfitted by education or experience for the responsibility thrust upon it. This was succeeded by a semimilitary, semicivil uprising, under which the white race, inferior in number, but superior in spirit, in governmental instinct and in intelligence, was restored to power. The anomaly was then presented of a government, whose distinctive characteristic was that it rested upon the will of the majority, being controlled and administered by a minority of those entitled, under its organic law, to exercise the electoral franchise. The habitual disregard of one law not only brings it finally into contempt, but tends to weaken respect for all other laws. The most dangerous and insidious form in which this evil can exist is that which manifests itself in the disregard

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of public, rather than of private, right; for not only are the consequences more widely diffused and less rapidly eradicated, but because no particular right of individuals is directly involved, resistance is less prompt, and the evil progresses to dangerous proportions before its existence is noted.

Not only was the question of the franchise a most difficult one for solution, by reason of its nature, but there was added to its treatment the limitations upon state action imposed by the amendments to the federal constitution. The difficulty, as all men knew, arose from racial differences. The federal constitution prohibited the adoption of any laws under which a discrimination should be made by reason of race, color or previous condition of servitude.

It would too much extend the volume of this opinion to enter upon a review and examination in detail of all the provisions of our recent constitution in which the subject of the electoral franchise, and the cognate one of the selection of governmental agencies, are dealt with. We deal with so much only as is necessary to a determination of the question involved.

He who reads the constitution of 1869 and that of 1890 will have his attention arrested by the marked differences in the number and character of the provisions upon the franchise, and the selection of the chief magistrate of the state.

The constitution of 1869, in its single article on the franchise, sec. 2, art. 7, provided simply that "all male inhabitants of this state, except idiots and insane persons, and Indians not taxed, citizens of the United States, or naturalized, twenty-one years old and upwards, who have resided in this state for six months, and in the county one month next preceding the day of election, at which said inhabitant offers to vote, and who are duly registered according to the requirement of section 3 of this article, and who are not disqualified by reason of any crime, are declared to be qualified electors." The governor and other state and county officers were, under this constitution, selected by popular election.

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The corresponding article in the constitution of 1890, sec. 241, is as follows: "Every male inhabitant of this state, except idiots, insane persons, and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this state for two years, and one year in the election district, or in the incorporated town or city, in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which may have been legally required of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officers holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the gospel, in charge of an organized church, shall be entitled to vote after six months' residence in the election district, if otherwise qualified."

By other provisions representation in the house and senate was apportioned among the counties and the counties were arranged in three groups, and the minimum representation to which each group should be entitled in the house was fixed, but it was provided that a reduction in the number of senators and representatives might be made by the legislature "if the same be uniform in each of said three divisions." To the election of the governor by the popular vote it is necessary that some person shall receive not only a majority of the popular vote, but also a majority of "electoral votes," which are votes distributed among the several counties in proportion to the number of representatives to which they are respectively entitled. If no person shall receive such majorities, then the house of representatives is required to choose a governor from the two persons who shall have received the highest number of popular votes. Constitution, secs. 254, 255, 256, 140, 141.

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If we look at the map of the state and at the census reports showing the racial distribution of our population, and consider these in connection with the apportionment of the constitution, it will at once appear that unless there shall be a great shifting of populations, the control of the legislative department of the state is so fixed in the counties having majorities of whites as to render exceedingly improbable that it can be changed in the near future by the ordinary flow of immigration, or by the growth by births among our own people. The election of the chief executive of the state is also largely affected by the same means. It is in the highest degree improbable that there was not a consistent, controlling, directing purpose governing the convention by which these schemes were elaborated and fixed in the constitution. Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone. A voter who should move out of his election precinct, though only to an adjoining farm, was declared ineligible until his new residence should have continued for a year. Payment of taxes for two years at or before a date fixed many months anterior to an election is another requirement, and one well calculated to disqualify the careless. Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifi-

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cations, while robbery and murder, and other crimes in which violence was the principal ingredient, were not.

True, as argued by counsel, the provision is a revenue measure, for it imposes a tax. But it is also true that the payment of the tax is one of the qualifications of an elector, and the question is, whether its primary purpose is for revenue with incidental disqualification to vote attached upon its nonpayment, or whether the tax was levied primarily as an additional disqualification to those who should not pay it, with the incident of revenue derivable from those who should pay. It is to be noted that the section is a part of the article on franchise, and not of that on common schools, in aid of which the tax was levied, and where it would more appropriately be placed as a revenue measure. This is not of great importance, but is of some weight. When a constitution is submitted to the vote of the people and becomes operative only when adopted by them, we are aware of the rule that the debates of the convention and the journals, showing how and when amendments were introduced, and the course of procedure, are of little weight. The reason is, that under such circumstances it is not so much what the members of the convention thought or said upon a given subject as what the people intended to declare by adopting the instrument, that is material. But it must be remembered that our constitution was never submitted to the people. It was put in operation by the body which framed it, and therefore the question is what that body meant by the language used.

In this view the following history of the subject of poll taxes, as appearing in the journals of the convention, will cast some light upon the question involved. The poll tax was first suggested by some amendments offered by Mr. Calhoun, the president of the convention, of which three hundred copies were ordered to be printed, and the amendments were referred to the appropriate committees. The poll tax section was among the amendments relating to franchise, and, as offered, provided that its payment should be a prerequisite to entitle one to vote.

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“No penalty, other than levy and sale of landed property, shall ever be exacted for its nonpayment.” Journal, p. 38.

The seventh section of the article on education, as reported by the committee on that subject, was as follows: “The legislature shall levy a poll tax of two dollars a head in aid of the school fund, and for no other purposes, and the payment of said tax shall be made compulsory, under such conditions and exceptions as may be deemed best by the legislature.” Journal, p. 121. As reported to the convention by the committee on franchise, the clause now under consideration read as follows: “Said tax to be a lien on taxable property.” Journal, p. 135. As adopted it was in its present form. Journal, p. 228.

It is evident therefore that the convention had before it for consideration two antagonistic propositions—one to levy a poll tax as a revenue measure and to make its payment compulsory; the other to impose the tax as one of many devices for excluding from the franchise a large number of a class of persons, which class it was impracticable wholly to exclude and not desirable wholly to admit. In our opinion, the clause was primarily intended by the framers of the constitution as a clog upon the franchise, and, secondarily and incidentally only, as a means of revenue.

Having reached this conclusion, it follows, as a corollary, that when the language used is susceptible of two constructions, it must be so construed as to carry into effect the purpose of the convention.

It is evident that the more the payment of the tax is made compulsory, the greater will be the number by whom it will be paid, and therefore the less effectual will be the clause for the purpose it was intended. It cannot be denied that it was the purpose of the convention to declare a different rule in reference to property subjected to taxation and that which was exempt, and when we consider the fact that a very large proportion of those it was thought desirable to exclude from the exercise of the franchise owned no other property than that which

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had for many years been exempted from taxation, the conclusion becomes irresistible that it was intended to leave the payment of the tax to the voluntary action of those who owned no other than nontaxable property.

Having reached this conclusion, it is not deemed necessary to examine and review the various statutes which have been brought to our attention. They were all brought forward into the code of 1892 from the code of 1880, which was enacted under our former constitution, in which there were no restrictions. They must now be confined in their operation to such property as is within the competency of the legislature to subject to seizure and sale.

The decree is affirmed.

1

J. W. OWENS ET AL. v. BOARD OF LEVEE COMMISSIONERS FOR THE YAZOO-MISSISSIPPI DELTA.

PRACTICE. *Land taken for levee purposes. Ejectment not available. Statutory remedy exclusive. Act February 7, 1894 (Laws, p. 95).*

Ejectment does not lie for land taken for levee purposes by the Board of Levee Commissioners for the Yazoo-Mississippi Delta, even when compensation has not preceded the taking, since the act of February 7, 1894 (Laws, p. 95), provides an exclusive remedy of a different nature.

FROM the circuit court of Tunica county.

HON. F. A. MONTGOMERY, Judge.

The appellants sued the appellees in ejectment for certain land that had been taken by the latter for levee purposes, claiming, also, damages for the taking of the land sued for and such other damages as resulted from the taking to their adjacent land. The defendants pleaded the general issue, and, on the trial before the court, a jury having been waived, plaintiffs introduced evidence showing a sale of land to the state for taxes,

Brief for appellees.

in 1883, and sale by the state to plaintiffs in 1886, and also the taking by defendants and the damages occasioned thereby. When the plaintiffs rested, the defendants, who had objected to the evidence as it was offered, moved to exclude the whole, because the action of ejectment did not lie, plaintiffs' remedy being confined to the *ad quod damnum* proceeding provided by the statute and made exclusive of every other; and also because the evidence showed that the land belonged to the state when defendant's board was created, in 1884, by an act of the legislature that was, in effect, a grant by the state of the necessary right of way to the defendants for levee purposes. The court sustained the motion on the ground that ejectment did not lie, without expressing any opinion as to the effect of the act of 1884 as a grant by the state, and, judgment having been entered for the defendants, plaintiffs appealed.

J. B. Chrisman, for the appellant.

The plaintiff, when his title was denied, had the right to sue in ejectment, and after he had shown a valid title acquired from the state, his action should not have been defeated, in the absence of all proof of expropriation by the defendants under the act of February 7, 1894. Counsel also discussed at length the claim that the act of 1884 operated as a grant to defendants of the right of way for the construction of levees through all state lands.

St. John Waddell, for the appellees.

1. Under the act of February 7, 1894 (Laws, p. 99), the remedy by appraisal of damages and condemnation is made exclusive.

2. The state owned the land when it created defendants' board in 1884 and directed them to take and hold any land whatever that might be necessary for the location or maintaining of their line of levee. Act of February 28, 1884, sec. 3 (Laws, p. 142). This was equivalent to a grant of the neces-

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sary right of way through such lands. Mills on Em. Dom., sec. 351, p. 534, and authorities cited.

WHITFIELD, J., delivered the opinion of the court.

Without reference to the question as to a grant by the state in aid of the levee board—as to which see the act of February 28, 1884 (Laws, p. 140, § 2); act of February 7, 1894 (Laws, p. 95); Mills, Em. Dom., sec. 351, and authorities, especially *Com. v. Boston & N. R. Co.*, 3 Cush., 25, and Rand., Em. Dom., sec. 297—it is clear, under our statute—act February 7, 1894, *supra* (§ 1, p. 99, Laws 1894)—ejectment does not lie in the case made by this record. The statute expressly declares that the remedy therein provided “shall be exclusive of all other remedies.” That the compensation did not precede the injury, as it ordinarily would, and ought to do, makes no difference on the facts of this case, as it did not in *Board of Comrs. v. Johnson*, 66 Miss., 248.

Affirmed.

JOHN HENRY DIXON v. STATE.

1. CONSTITUTION OF 1890. *Jury laws enacted thereunder. Code 1892, § 2358.*

The constitution of 1890, and the jury laws enacted thereunder, are not obnoxious to the fourteenth amendment to the constitution of the United States because of discrimination on account of race, color or previous condition of servitude. *Gibson v. Mississippi*, 162 U. S. Repts., 565.

2. SAME. *Ratification. Representation in congress.*

The constitution of 1890 is not invalid because it was not submitted to and ratified by a vote of the people. Nor is it rendered inoperative because the state's representation in congress has not been reduced since its adoption. *Sproule v. Fredericks*, 69 Miss., 898.

3. SAME. *Construction. Limitations thereon.*

This court, in construing the constitution of 1890, must look alone to the perfected work of the convention. It has no power to investi-

74	271
86	140
74	271
191	507

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gate the private individual purposes of the members of that body, and cannot consider their racial complexion.

4. SAME. *Sections 241, 242, and 244.*

Sections 241, 242, and 244 of the constitution of 1890 are not in violation of the fourteenth amendment of the constitution of the United States upon the idea that they discriminate, or that they vest in administrative officers the power to discriminate, against citizens by reason of race, color or previous condition of servitude.

5. SAME. *Jurors. Payment of taxes.*

While it is essential, under the constitution of 1890, that a juror shall be a qualified elector, yet it is unnecessary that he shall have produced satisfactory evidence of the payment of taxes to the officers holding an election; such payment may be proved before the court.

6. CRIMINAL LAW. *Removal to United States court. Negroes.*

If in the constitution or statutes of a state discrimination is made against negroes on account of race, color or previous condition of servitude, and they are by force thereof excluded from serving on juries, a defendant, whose race is so discriminated against, can remove a criminal prosecution against him to a court of the United States; but if the complaint is that by acts of officers of the state, charged with the administration of impartial laws, discrimination has been made against his race, the defendant must make defense in the state courts, and appeal, if need be, from the final judgment of the highest court of the state to the supreme court of the United States.

7. SAME. *Quo animo of defendant's acts.*

Upon trial of an indictment for murder, it being shown that defendant shot at one person and killed another, the state may introduce evidence to prove defendant's hostile feelings towards the person against whom the shot was aimed.

8. SAME. *Grand jury. Objections. Code 1892, § 2375.*

Code 1892, § 2375, requires that objections to the qualifications of grand jurors must be made, if at all, before they are impaneled, and they cannot be raised afterwards.

FROM the circuit court of Washington county.

HON. R. W. WILLIAMSON, Judge.

Brief for the state.

The defendant was indicted for the murder of Nancy Miner. He moved the court below for an order removing the case to the United States court, which motion was overruled. Defendant also made a motion to quash the indictment, and this motion was denied. The facts upon which these motions were based are stated in the opinion of the court. Upon the trial, it appeared in evidence that defendant shot at another person, and killed Nancy Miner, whom, it is claimed, he did not see. The state, over defendant's objection, introduced evidence showing that defendant entertained hostile feelings towards the person at whom his shot was aimed. Defendant was convicted, and sentenced to the penitentiary for life. He appealed from the conviction and sentence.

C. J. Jones, for appellant.

Wiley N. Nash, Attorney-general, for the state.

The petition for removal was properly denied. The action of the court was justified by the decision of the supreme court of the United States in *Neal v. Delaware*, 103 U. S., 370. This case is an authority in point. The cases of *Gibson v. State*, MS. op., and *Charley Smith v. State*, MS. op., decided by this court, sustain the action of the court below. The case of Smith was appealed to the United States supreme court and affirmed, and is reported in 162 U. S., 592. The case of Gibson was also appealed and also affirmed. 162 U. S., 592. Neither of these cases are reported in our reports. In the Smith case Mr. Justice Harlan, in rendering the opinion of the court, holding the petition for removal was properly denied, states: "Neither the constitution nor the laws of Mississippi, by their language, reasonably interpreted, or as interpreted by the highest courts of the state, show that the accused was denied, or could not enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution was pending, any right secured to him by

Brief for the state.

any law providing for the equal civil rights of citizens of the United States.”

In the Gibson case the justice, in denying the application for removal, or rather passing upon this point, says: “But they do not support the application for the removal of this cause from the state court in which the indictment was found, for the reason that neither the constitution of Mississippi nor the statutes of the state prescribe any rule for or mode of procedure in the trial of criminal causes which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the state, without regard to race or previous condition of servitude.” *Gibson v. State*, 162 U. S., 582. On the same page will be found this language: “But when the constitution and laws of a state, as interpreted by its highest tribunals, do not stand in the way of the enforcement of rights secured equally to all citizens of the United States, the possibility that during the trial of any particular case the state court may not respect and enforce the right to the equal protection of the laws constitutes no ground, under the statute, for removing the prosecution into circuit court of the United States in advance of the trial.”

As to the action of the court below in not allowing the removal, there is no error, according to both the decision of this court in the cases above referred to, when before it, as well as the action of the supreme court of the United States, where both cases were affirmed on writ of error.

It will readily occur to the court, upon a review of the subject in the light of recent authorities, that the motion to quash could not have been sustained on reason or authority. The United States supreme court, in the Gibson case, before cited, states: “The conduct of a criminal trial in a state court cannot be reviewed in this court unless the trial is had under some statute repugnant to the constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Mere error in

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administering the criminal law of a state, or in the conduct of a criminal trial, no federal right being invaded or denied, is beyond the revisory power of this court, under the statutes regulating its jurisdiction." Citing *Andrews v. Swarts*, 156 U. S., 272, 276; *Bergeman v. Backer*, 157 U. S., 655, 659. Indeed, it would not be competent for congress to confer such power on this or any other court of the United States. *Gibson v. Mississippi*, 162 U. S., 591.

The whole effort of the appellant in the case at bar is to make a parol allegation of the purpose and intent for which the people of Mississippi assembled to amend her constitution and her laws, and then again by further parol testimony to establish the intent with which such constitution and laws were passed, changed or amended. Such an effort, such an attempt, is unprecedented in legislative or judicial history in this or any other civilized country, and such an idea will not be entertained for a moment.

There are no provisions in the constitution of Mississippi, there are no laws passed pursuant to this constitution, which, *per se*, deprive the colored citizen of any right, civil or political, which are enjoyed by any other citizen, race, color or class. The same constitutional provisions, the same laws, apply to each and every inhabitant within our state. Every citizen of the state, whether of the Caucasian, Mongolian, African or other race, if he can qualify under general laws, has the privilege of the elective franchise, the right to hold office, serve on grand or petit juries. Every colored man in the state is eligible to all these rights and privileges, as much so as any other citizen in the state.

In the case of *Strauder v. West Virginia*, 100 U. S., p. 303, the law complained of there expressly stated that "all white male persons, who are twenty-one years of age, and who are citizens of this state, shall be liable to serve as jurors, except as herein provided." In Mississippi we have no such law as this, discriminating against race or color. In the West Vir-

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ginia law, all persons of a certain race were excluded from serving on juries, solely on account of color, so that by no possibility could a colored man sit upon a jury. No such contention can be made as to the case at bar. Our constitution and our laws refuse such a proposition. There is no provision in the constitution of this state, no law on the statute book, that *per se* can be said to be directed by way of discriminating against negroes, or any other people or race, as a race, or class as a class.

COOPER, C. J., delivered the opinion of the court.

The appellant has been indicted, convicted, and sentenced to imprisonment for life for the murder of one Nancy Miner. In the court below the defendant made a motion to quash the indictment, and when the motion was overruled he moved for a transfer of the cause from the state to the federal court. This motion was also denied. The action of the court in refusing to quash the indictment, and in denying the petition for a transfer of the cause, constitute the principal errors assigned. The motion and the petition set out, in effect, the same facts, and affidavits of several persons were filed that the matters therein stated were, as affiants believed, true. The purpose of the motion seems to have been primarily to assail the validity of all the laws passed since the adoption of our recent constitution, and of that constitution itself, on the ground that said constitution and laws are obnoxious to the fourteenth amendment to the constitution of the United States. The motion is too long to be inserted in this opinion. It states some facts, many inferences and deductions, and an argument to show that the conditions resulting from the adoption of the constitution are incompatible with the rights guaranteed to the colored race by the fourteenth amendment. Compressed within reasonable limits, the substance of the motion is that the constitutional convention was composed of 134 members, of which 133 were whites and one only a negro; that the purpose and object of

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said constitution was to disqualify, by reason of their color, race, and previous condition of servitude, 190,000 negro voters; that the constitution was not submitted to a vote of the people, and that the representation of the state in congress has not been reduced, as it should have been, upon the disqualification of so great a number of voters; that sections 241, 242, and 244 of the constitution of this state are in conflict with the fourteenth amendment to the constitution of the United States, because they vest in administrative officers the power to discriminate against citizens by reason of their color; and, that the purpose of so investing such officers with such power was intended by the framers of the state constitution, to the end that it should be used to discriminate against the negroes of the state.

We will recur to the contents of the motion hereafter, for the purpose of considering such averments as seem more nearly related to the subject under investigation, viz., the competency and legality of the grand jury by which the indictment against appellant was returned. At this point in the investigation it is sufficient to say that we have no power to investigate or decide upon the private, individual purposes of those who framed the constitution, the political or racial complexion of the body of the convention, and have no concern with the representation of the state in congress. We can deal only with the perfected work—the written constitution adopted and put in operation by the convention. We have heretofore decided that it was competent for the convention to put the constitution in operation without submitting it for ratification by a vote of the people. *Sproule v. Fredericks*, 69 Miss., 898.

We find nothing in the constitutional provisions challenged by the appellant which discriminates against any citizen by reason of his race, color or previous condition of servitude. Section 241 declares who are qualified electors, sec. 242 makes it the duty of the legislature to provide for the registration of persons entitled to vote, and sec. 244 declares that “on and after the first day of January, A.D. 1892, every elector shall,

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in addition to the foregoing qualification, be able to read any section of the constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof. A new registration shall be made before the next ensuing election after January the first, A.D. 1892." All these provisions, if fairly and impartially administered, apply with equal force to the individual white and negro citizen. It may be, and unquestionably is, true that, so administered, their operation will be to exclude from the exercise of the elective franchise a greater proportionate number of colored than of white persons. But this is not because one is white and the other is colored, but, because of superior advantages and circumstances possessed by the one race over the other, a greater number of the more fortunate race is found to possess the qualifications which the framers of the constitution deemed essential for the exercise of the elective franchise.

We have searched the record in vain to discover any averment that the officers of the state charged with the duty of selecting jurors in any manner exercised the power devolved upon them to the prejudice of the appellant, by excluding from the jury list members of the race to which he belongs. The motion contains much irrelevant matter, set up with great prolixity, and in involved and obscure language. But repeated and careful examination conducts us to the conclusion that much of its seeming obscurity vanishes when we read the motion in the light of the opinion entertained by counsel as to how the supposed discrimination has been made. He did not intend to charge, by the motion, that the officers by whom the grand jury was selected violated the law, but that they were, by the law under which they acted, required to select jurors from certain lists furnished to them by the officers charged with the duty of holding elections in the state, and that these election officers, in making such lists, discriminated against the race of appellant. In this view, the motion was properly denied, for the reason that jurors are not selected from or with reference

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to any lists furnished by such election officers. No such list is required to be made for use in selecting jurors, nor does the motion distinctly charge that any such was returned to the officers charged with the duty of selecting jurors, and by them used. The motion is based on the assumption that such list was essential to the selection of the grand jury, and without it no jury could be drawn, and that the list was made by discriminating against the negro race.

Our laws in reference to elections, and in reference to the selection of grand and petit juries, are totally distinct. To be an elector, or to serve upon a jury, one must be registered as a voter. But the acts and doings of those charged with holding elections can exercise no influence upon those by whom juries are selected. One may be denied the right to vote by the election officers, and yet be permitted to sit upon juries, grand or petit; and one may be ineligible to sit upon a jury, and yet qualified and permitted to vote. By sec. 241 of the constitution, it is provided that "every male inhabitant of this state, except idiots, insane persons and Indians not taxed, who is a citizen of the United States, twenty-one years old and upwards, who has resided in this state two years, and one year in the election district, or in the incorporated city or town, in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and who has paid, on or before the first day of February of the year in which he shall offer to vote, all taxes which may have been legally demanded of him, and which he has had an opportunity of paying according to law, for the two preceding years, and who shall produce to the officer holding the election satisfactory evidence that he has paid said taxes, is declared to be a qualified elector; but any minister of the gospel in charge of an organized church shall be entitled to vote after six months' residence in the election district, if otherwise qualified." Sec.

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264 declares who shall be qualified as jurors. It is as follows: "No person shall be a grand or petit juror unless a qualified elector and able to read and write; but the want of any such qualification in any juror shall not vitiate any indictment or verdict. The legislature shall provide by law for procuring a list of persons so qualified, and the drawing therefrom of grand and petit jurors for each term of the circuit court." It is not necessary that one desiring to register shall have paid his taxes as prescribed by sec. 241. That has to do with voting, and not registration. *Bew v. State*, 71 Miss., 1. One who has registered, and has in fact paid his taxes, although he has not offered to vote, and therefore has not produced to the officers holding an election satisfactory evidence of such payment, and who can read the constitution (*Mabry v. State*, 71 Miss., 716) and write, is qualified, under the constitution, to sit as a juror. It is true that sec. 241, in declaring who are electors, seemingly imposes, as an essential qualification, that the elector not only shall have paid his taxes, but also shall have produced satisfactory evidence thereof to the officers holding an election. But the section must have a reasonable and sensible construction. Registration, and payment in fact of the taxes as prescribed, are the substantial things required to qualify one as an elector. Proof of the fact that taxes have been paid, to the satisfaction of the election officers, is also required when the elector comes to vote; but, when he is presented as a juror, such payment is proved before the court, and not by the fact that he has been permitted to vote. If in truth he has paid his taxes, and possesses the other requisite qualification, the fact that he has never offered to vote, and therefore has never "produced to the officers holding an election satisfactory evidence that he has paid said taxes," or if, offering to vote, has failed to satisfy the officers that he has paid taxes, does not render him ineligible as a juror.

Section 2358 of the code prescribes how the jury lists shall be made. It provides that "the board of supervisors at the

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first meeting in each year, or at a subsequent meeting if not done at the first, shall select and make a list of persons to serve as jurors in the circuit court for the next two terms to be held more than thirty days afterwards, and, as a guide in making the list, they shall use the registration books of voters, and it shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character, and shall take them, as nearly as it conveniently can, from the several election districts, in proportion to the number of qualified persons in each, excluding all who have served on the regular panel within two years, if there be not a deficiency of jurors." It is from the list thus made that grand and petit juries are drawn. The sections of the code under which the appellant claims that he was discriminated against, have relation, not to the selection of juries, but to the subject of registration and voting; and his contention is not that persons entitled to register were denied registration by the registrar, but that the managers of elections are, by the law, made judges of the qualifications of electors offering to vote, and have denied to persons qualified to vote the right so to do. Conceding this to be true, we fail to perceive in what manner the appellant has been injured. The managers are required to supervise the election, and are authorized to examine, on oath, any person duly registered and offering to vote, touching his qualifications as an elector. They are the judges of the qualifications of such persons, and may deny the right to vote to one not entitled, though he be registered. But they have no power to strike the name of such person from the books, nor to put any additional names thereon. The registration book of the county does not go into the possession of the managers of the election, but they are furnished with poll books which contain the names of the registered voters in the district, copied from, or made contemporaneously with, the registration book.

As votes are cast, one of the clerks of the election takes down on a list the names of the voters, while the other enters a

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check upon the poll book, opposite the name of such person, and, at the close of the election, the votes are counted and the result declared. And the statute provides that "the statement of the result of the election in their election district shall be certified and signed by the managers and clerks, and the poll books, tally lists, list of voters, ballot boxes and ballots shall all be delivered, as required, to the commissioners of election." Code, § 3670. This is the only list known to us that the law requires to be made by the officers. It does not show, or purport to show, who are qualified electors, but only who have voted; and it has no relation except to matters connected with the election, and performs no function in reference to the selection of jurors. The boards of supervisors, by which bodies jury lists are made, never see these lists. They are returned and dealt with by the election commissioners, a wholly different body. And so, if it be true that the managers of elections have discriminated against colored voters, and unlawfully denied them the right to vote, it does not appear how the appellant has been deprived of any advantage or protection afforded to him either by the constitution or laws of this state or by the constitution of the United States.

There is no suggestion in the motion that the jury commissioners were guilty of any fraud or discrimination in selecting the jurors. If in truth there was no registration book in the county to guide them in their selection of the jurors, their action in making the jury list was irregular, and, upon objection made before the grand jury was impaneled, the panel would have been quashed. *Purvis v. State*, 71 Miss., 706. But our statute provides that "before swearing any grand juror as such, he shall be examined by the court on oath touching his qualification, and after the grand jurors shall have been sworn and impaneled, no objection shall be raised, by plea or otherwise, to the grand jury, but the impaneling of the grand jury shall be conclusive evidence of its competency and qualification, but any party interested may challenge or except to the array for

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fraud." *Head v. State*, 44 Miss., 731; *Durrah v. State*, 44 Miss., 789.

In *Neal v. Delaware*, 103 U. S., 370, and *Gibson v. Mississippi*, 162 U. S., 565, the supreme court of the United States has thoroughly discussed the subject of the right of a negro to the impartial protection of the law, and has clearly expressed the circumstances under which, and the means by which, that right is to be vindicated. If, by the constitution or laws of the state, negroes are, by reason of their race, color, or previous condition of servitude, excluded from juries, or in such other manner discriminated against as that a fair and impartial trial cannot be had in the state courts, then a negro proceeded against in the courts of the state may have his cause removed to the courts of the United States for trial. If there is no discrimination by the law, but the complaint is that by the act of the officers of the state, charged with the administration of fair and impartial laws, discrimination has been made against the race, the defendant may not have a removal of his cause, but must make his defense in the state courts, and appeal from the final judgment of the supreme court of the state to the supreme court of the United States.

In *Gibson v. Mississippi*, *supra*, the supreme court of the United States declared that neither the constitution nor laws of this state prescribed any rule for or mode of procedure in the trial of criminal cases which is not equally applicable to all citizens of the United States, and to all persons within the jurisdiction of the state, without regard to race, color, or previous condition of servitude. We can discover nothing in the record which shows that the appellant, either by the laws of this state or by their administration, has been denied the right of a fair and impartial trial. The motion to quash the indictment, and for removal of the case, were properly overruled. We have dealt with the case upon the assumption that the facts set out in the motion are true. No objection was made in the court below because the proof was made by affidavits instead of by

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witnesses, and it is common practice in our courts, in the absence of objection, to hear affidavits on motions.

The error assigned touching the action of the court in admitting evidence of the state of feeling of appellant towards the woman Lavinia, at whom the shot was fired that killed Nancy Miner, is not maintainable. The defendant himself, on cross-examination of the witness Eliza Miner, drew out this evidence. But, aside from this, the evidence was entirely competent as tending to show *quo animo* the fatal shot was fired.

The judgment is affirmed.

74	284
393	306

ILLINOIS CENTRAL RAILROAD CO. v. E. C. WILBOURN.

1. RAILROADS. *Waters. Obstructions. Overflow. Former recovery.*

An action against a railway company for such damage as has resulted to the upper of two adjoining tracts of plaintiff's land from overflow, caused by an insufficient culvert and the erection of an embankment, is not barred by reason of his assignor's previous recovery of damages for the total destruction in value of the lower tract from the same cause.

2. SAME. *Peremptory instruction.*

It is the province of the jury to determine whether, or not, the injurious effects of the manner in which the natural flow of water has been obstructed by a railway company, are consistent with a due regard by such company for the rights of adjacent proprietors in the construction of its road.

3. SAME. *Erroneous instruction.*

It is error, in an action for damages to plaintiff's lands resulting from an overflow, caused by an insufficient culvert and an embankment constructed by the defendant railroad company, to instruct the jury that the "plaintiff had the right to have the water, whether rain water or spring water, flow as they naturally would have flowed without any obstruction by the railroad," for an interference with the natural flow of water incident to a proper construction and use of its roadbed, imposes no liability upon the defendant.

Brief for appellant.

FROM the circuit court of Yalobusha county.

HON. EUGENE JOHNSON, Judge.

The opinion states the case.

R. H. Golladay, for the appellant.

1. This suit and that in which the appellee's assignor recovered damages in 1891, relate to adjoining forty-acre tracts of land, and both are for the same cause of action, viz., the closure, in 1880, of a culvert and the construction of an embankment, interrupting a natural water course, thereby causing overflows and deposits of sand. Damages resulting from the same cause cannot be apportioned or "split." 15 Am. & Eng. Enc. L., 348, 349; *State v. Morrison*, 60 Miss., 81, 82; 2 Black on Judgments, sec. 734 *et seq.* In torts the same rule applies. 2 Black on Judgments, sec. 738; *Beronio v. Southern Pacific Railroad Co.* (Cal.), 21 Am. St. Rep., 57; *Pierro v. St. Paul, etc., Railroad Co.* (Minn.), 40 N. W. Rep., 520; *Knorlton v. New York, etc., Railroad Co.* (Mass.), 18 N. E. Rep., 580; *Wichita v. Beebe* (Kan.), 18 Pac. Rep., 502; *Swanz v. Muller*, 27 Ill. App., 320; *Sullivan v. Barter*, 150 Mass., 261; *Bowe v. Minnesota Milk Co.*, 44 Minn., 460.

2. Where the injury is of a permanent nature, and, from its nature, must continue to produce loss independent of any subsequent wrongful act, all damages may be estimated in a single suit. 3 *Suth. on Dam.* (ed. 1884), 403; *Fowle v. New Haven, etc.*, 107 Mass., 352; 112 Mass., 334; *Town of Troy v. Cheshire Railroad Co.*, 23 N. H. (3 Foster), 102 *et seq.*; *Powers v. Council Bluffs*, 45 Iowa, 652; *Epright v. Kauffman*, 33 Mo. App., 455; *Hodge v. Shaw* (8 Iowa), 39 Am. St. Rep., 290, note p. 295; *North Vernon v. Voegler*, 103 Ind., 314; *Ind., Bloom., etc., Ry. Co. v. Koons*, 105 Ind., 507.

3. A recovery in this suit was barred by that in the previous action. 2 Black on Judgments, title Former Recovery, 4. Plaintiff's remedy was also barred by limitation. 53 Am. Rep., 135; *Angell on Lim.*, sec. 300 *et seq.*

Brief for appellee.

Mayer & Harris, on the same side.

1. The injury complained of was from surface water, and is not shown to have been caused by any wrongful or negligent act of defendant in the construction of its roadbed. The instruction given for plaintiff is, in this view, contrary to the doctrine expressed in the recent case of *Davis v. Railroad Co.*, 73 Miss., 678.

2. The peremptory instruction for defendant should have been given. The recovery in the former suit for damages to the lower forty acres was based upon the total destruction of that parcel in value, and no real injury to the upper forty acres is shown.

W. V. Sullivan, for the appellee.

1. A continuing injury may be sued for each day, each month, or each year, and one recovery cannot and will not bar another. We must presume, in this case, that the jury limited the recovery to that land not embraced in the former suit, the record showing nothing to the contrary.

2. The instruction granted to plaintiff was correct. If the water flowing from the hillside, and gathered into ditches or streams, was really rain water, that fact in nowise affects the plaintiff's right to have these courses carry off the flowing water without obstruction.

3. The court below did not err in refusing the peremptory instruction asked by defendant, for some injury manifestly resulted from defendant's acts to that part of the land not embraced in the former suit. The instructions given for defendant stated the law in a manner very favorable to its contention. There can be no doubt of plaintiff's right to a recovery. 51 Miss., 77, and 234; 67 *Ib.*, 38; 68 *Ib.*, 760; 71 *Ib.*, 547; 72 *Ib.*, 881.

Argued orally by *J. B. Harris*, for the appellant, and by *W. V. Sullivan*, for the appellee.

Opinion of the court.

CALHOON, Sp. J., delivered the opinion of the court.

Wilbourn, by an appropriate declaration, complains of damage to certain lands by the improper construction of an embankment by the railroad company, and from the fact that the company left too small a culvert over a running stream to allow the efflux of the stream and the surface waters finding egress through it. The result of this, he charges, was to hem in the waters and destroy the value of his land by the deposit of silt and sand. The land damaged is composed of two tracts, which, for convenience, may be called the "upper tract" and the "lower tract." The company pleaded the general issue, with the notice under it of an antecedent action for damages to the lower tract several years ago, which action proceeded on the allegation, confirmed by the proof, that the value of the lower tract was totally destroyed because of the negligent construction aforesaid. The company also gave notice of the three-years statute of limitation. The only witness produced was Wilbourn himself, and there was an agreement of counsel. By these it appears that the present action is for injuries from the same original cause as in a previous action, viz., an insufficient culvert over a stream, and the erection of an embankment, and that this action is for further damages to the lower tract, produced since the previous recovery, and for damages to the upper tract, which upper tract was not embraced in the previous suit, and the claim here is for damages within three years before the institution of this action, and that in the former action the recovery of damages was duly paid, and that in the former action the declaration and evidence showed that the lower tract was made wholly valueless by the obstruction.

Mr. Wilbourn is not clear in his statements as a witness, but the following is the tendency of his testimony: That the deposit of silt and sand by lapse of time had extended further up, so as to affect the upper tract, and he supposed that this resulted because the company did not have the proper "thing" to convey the water, and that the surface water could not get out

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from the hillside, and that it came to rest in the lower places, and remained there until it gradually siped off, for want of sufficient outlet through the embankment made by the company, so that he cannot make a crop on either tract; and he estimates the damage to the upper tract at \$50 per annum by reason of the banking up of sand and trash from the hillsides and the formation of sand bars. As to the lower tract, on which the previous recovery was had, he adheres to the statement that it was totally ruined, but, as the damages had been paid on the previous action, he says the only damage since consists in increasing the difficulties of reclamation. He says that no water course runs through the upper tract, but that that tract is only damaged by the banking of the water, and the resultant deposit of sand bars and spreading out of the sand over the ground. In this state of case the court gave the following charge for Wilbourn: "Plaintiff had the right to have the waters, whether rain water or spring water, flow as they naturally would have flowed without any obstruction by the railroad company; and, if the jury believe from the evidence that the railroad company so built its roadbed or bridges or trestle as to dam up the water, and bank the same upon the land, and cause sand and silt to be deposited thereon, and they injured the same, then the plaintiff is entitled to recover of defendant such net sum as represented the injury thus sustained; and the jury will so find." For the railroad company the court charged the jury to allow for no damage sustained before the former suit, and, if no fresh damage, since the first suit, had been sustained, they could find only for nominal damages; and the court charged further for the company that the jury could not allow any damages for the lower tract, and only such damages to the upper tract as were proved to have been sustained by the closing of the culvert since 1891. The court refused the company's peremptory instruction to find for defendant. There was a verdict for plaintiff, a motion for a new trial because of the refusal of the peremptory instruction, and because the court

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erred in granting the instruction asked for by Wilbourn, and because the verdict was contrary to the law and evidence. This motion was overruled, and the railroad company appealed.

The lower tract of land is out of consideration in this case, because the court below expressly charged the jury not to allow any damages as to that tract. We cannot agree to the contention of counsel that, because damages to the lower tract had been sued for and recovered as for the full value of it, this action must therefore necessarily fail in its claim for damages done the upper tract. These damages may have accrued by the deposit of silt and sand affecting the higher lands subsequently to the former suit. Though proceeding from the same cause, there was no prescience to foresee them.

The principle invoked of the entirety of the cause of action as announced in *State v. Morrison*, 60 Miss., 74, has no application to the state of facts in this case. There the state had sued to recover for breaches of the condition of a sheriff's bond, and was met with a plea of former recovery on the same bond, and her replication that the former recovery was for other breaches was held bad, because she might have and should have assigned all the breaches in the first action. In the case at bar the continuance of the original cause of evil may have affected the upper tract, which may have received no apparent damage when the first suit was brought, and it was not to be supposed that the cause would be permitted to remain until its effects should reach the upper tract.

The peremptory instruction asked by appellant was properly refused. It was the province of the jury to say whether the effects on the land testified to consisted with a proper regard for the rights of adjacent proprietors in the construction of its works by the railroad company. Such an obstruction of the natural flow of vagrant water from the high land as to produce sand bars and deposit sand and silt, so as to destroy the arable qualities of the land, certainly tended to show improper construction, in view of the principle that one should so use his own

Statement of the case.

as not to injure the property of others. In the light of the case of *Railroad Co. v. Davis*, 73 Miss., 678, it was error to grant the instruction asked by the plaintiff. It is not the law under that case (to which we adhere) that the railroad company is liable for damages for any obstruction of vagrant waters or of streams in the construction of their works, unless the same resulted from improper construction, and this charge to the jury should have embraced this idea. There is no conflict in the principles announced in the case of *Railroad Co. v. Davis* and those announced in *Sinai v. Railway Co.*, 71 Miss., 547; *Railway Co. v. Lackey*, 72 Miss., 881, and *Railroad Co. v. Miller*, 68 Miss., 760.

The case is reversed and remanded for another trial.

LOVE MANUFACTURING CO. ET AL. v. QUEEN CITY MANUFACTURING CO. ET AL.

CORPORATIONS. *Assignment. Insolvency. Directors preferred.*

While it has been decided in this state that an insolvent corporation may, in good faith, prefer creditors, yet the directors of such a corporation cannot, by their own votes and acts, prefer themselves. Whitfield, J., concurred in result, but favored overruling the cases which hold that insolvent corporation can make preferential assignments.

FROM the chancery court of Lauderdale county.

HON. W. T. HOUSTON, Chancellor.

The Queen City Manufacturing Company, an insolvent corporation, executed a general assignment, by which it preferred debts due to several of the directors who were stockholders, and it also preferred debts for which two of the directors who were stockholders were bound as indorsers. The directors who were beneficiaries of the preferences voted for and caused

74	290
78	182
74	290
88	712

Brief for appellants.

the assignment to be made. They constituted a majority of the board, and these same persons controlled and voted more than half the stock in the stockholders' meeting which ordered the assignment made. The assignee having filed his petition, under chapter 8 of the code of 1892, in the chancery court, the Love Manufacturing Company and others, creditors of the assignor, filed their cross petition assailing the assignment as fraudulent. This pleading presented the only question decided by the court. A demurrer thereto was sustained by the court below, and the cross petitioners appealed.

Miller & Baskin, for appellants.

We submit that when an insolvent corporation undertakes to make a general assignment by which it conveys all of its property to an assignee, and thereby suspends its business, or ceases to exercise its functions as a corporation, becoming practically dead, it cannot prefer its directors and officers, and that any such attempt would be violative of all the rules of law applicable to the same. It is a nullity, and cannot be enforced. The reasons which condemn this assignment are various, some courts holding, in substance, that the fund of an insolvent corporation is a trust fund for the benefit of the general creditors of the corporation, and should, therefore, be distributed, especially in a court of equity, ratably amongst all of said creditors; other courts hold that such an assignment cannot stand, because the directors of the corporation occupy a fiduciary relation to the creditors of the corporation, and cannot obtain a preference in their behalf in dealing with the property managed and controlled by them as such fiduciaries; still other courts hold that it might be conceded that the funds of the insolvent corporation are not a trust fund in favor of the general creditors without any specific lien thereon, still, to uphold such an assignment would be violative of public policy, because of the relation of the directors to the general creditors and to the insolvent corporation. The necessity of this limitation upon the

 Brief for appellants.

right to give preferences among creditors when asserted by corporations may not have been perceived in earlier times; but the growing importance and variety of modern corporations and interests, we submit, should compel its recognition and adoption. It is immaterial that this assignment was made by authority of the stockholders, because, in this particular instance, the directors were also practically all the stockholders, and the directors procured the same to be made for the manifest purpose of being benefited themselves.

The preference to W. F. Brown for his eight hundred and sixty-five dollars, the preference to B. F. Ormond for four hundred and eighteen dollars, and the preference to Brown and Weems as indorsers on the paper of the corporation, the assignor herein, stamp the assignment as fraudulent and void *per se*. *Consolidated Tank Line Co. et al. v. Kansas City Varnish Co. et al.*, 45 Fed. Rep., 7, and authorities cited therein; *Corey et al. v. Wadsworth* (opinion of the supreme court of Alabama, rendered June 14, 1892), 11 Southern Reporter, 350; 2 Morawetz on Private Corporations, 350; *Haywood et al. v. Lincoln Lumber Co. et als.*, 64 Wis., 639; *Howe, Bronen & Co. et al. v. Sanford Fork and Tool Co. et al.*, 44 Fed. Rep., 231; *Marr v. Bank*, 4 Cold., 476; *Hopkins' Appeal*, 90 Pa. State Rep., 76; *Ingwersen et al. v. Edgecombe et al.*, 60 N. W. Rep., 1032; Wait on Insolvent Corporations, sec. 162; *Olney v. Land Co.*, 16 Rhode Island, 597 (18 Atlantic Reporter, 181).

The sole question decided by our court in the case of *Arthur v. Commercial Bank*, 9 Smed. & M., 394, so far as it touches the present controversy, is that an insolvent corporation could make a preferential assignment. There is no pretense that *Arthur v. The Commercial Bank* announced that an insolvent corporation could make a preferential assignment, the preferences therein given being to the directors and officers of said insolvent corporation. No question of that kind was raised in that case. The real question in this case, as we understand it, now submitted to this court, viz., whether or not an insolvent

Brief for appellants.

corporation can make a general assignment, preferring the directors and officers of said corporation in said assignment, is *res integra* in our state, and we think that this court, in view of its oft-repeated declarations in reference to assignments, will follow the great majority of the highest courts of the states of this union in declaring that the directors and officers of a corporation will not be permitted to absorb the assets of the corporation and exclude all creditors from participating in said assets.

We respectfully call the attention of the court to the very able opinion delivered by Justice Harlan of the United States supreme court, while sitting with Jenkins, circuit judge, and Bunn, district judge of the circuit court of appeals of the seventh circuit. The opinion was rendered on the first day of October, 1894, in the case of *Sutton Mfg. Co. v. Hutchinson*, as reported in 63 Federal Reporter, page 496. This opinion of Justice Harlan is not only an elaborate one, but presents, as we from our reading conclude, all the authorities both for and against the proposition involved in this case. We do not see how to escape the conclusion that the law is against the appellee in this case.

Brame & Alexander, on same side.

We do not rest our contention that the assignment in this case is void on the ground that there was any trust in the usual sense in which this word is understood. The leading cases relied on by us do not rest their decisions on the ground of a trust, but rather on the ground of agency, and we do not, therefore, ask the court to overrule or in any way modify its previous decisions. What we contend for is, that four out of five directors of an embarrassed corporation cannot, in an effort to secure a preference for themselves as against other creditors, postpone such creditors, and, by their own votes, execute a general voluntary assignment to one of such voting directors, giving preferences to the other three. It is a settled and uni-

 Brief for appellants.

versal doctrine in the law of corporations that directors cannot vote upon questions affecting their private interests. See 1 Morawetz on Priv. Corp., sec. 517; 1 Beach on Priv. Corp., sec. 276; 1 Spelling on Priv. Corp., sec. 433; 3 Thompson Com. on Corp., sec. 4042; *Wardell v. Railroad Co.*, 103 U. S., 651; *Smith v. Los Angeles, etc., Ass'n*, 78 Cal., 289.

The courts everywhere are distinguishing between the right of directors of "going concerns," as they are called, and concerns which liquidate their own business by acts of insolvency. This distinction is not a new one in our own state's jurisprudence. It has been recognized and applied in the law governing assignments by partnerships, and even, to some extent, to assignments by individuals. We are not so uncandid as to say that oftentimes it is not equitably right for corporations to pay back advances made by its officers in extremities before paying other creditors, but the danger, the evils, the hardships, the fraud that lurks in the doctrine that directors and officers can prolong the life of an insolvent corporation at their pleasure and terminate it at their will, and, in the act of doing so, by their own votes reserve for their own debts the assets of the concern, are enough to cause the court to hesitate long before it will sanction such a doctrine.

The assignment is void under the authorities, and there is no decision of this court which requires that it should be upheld. Every recent text-book on corporations which treats of this subject, lays down the rule that an insolvent corporation cannot, by a general assignment, prefer its own directors. By far the greater number of states hold to the same doctrine. Indeed, it is hardly supposable that all the text writers (Morawetz, Beach, Cook, and others) should agree in stating the rule to be this unless they were supported in it by the number and weight of the decisions. *Hill v. Pioneer Lumber Co.*, 113 N. C., 173; *Roseboom v. Warner*, 23 N. E. Rep., 339 (Ill.); *Bradley v. Farwell*, 1 Holmes, 433; *Little Rock R. R. Co. v. Page*, 35 Ark., 304; *Lyons-Thomas Hardware*

Brief for appellees.

Co. v. Perry, Stove Co., 27 S. W. Rep., 100; *Harrigan v. Quay*, 26 *Ib.*, 897; *Ford v. Plankinton Bank*, 58 N. W. Rep., 766; *Svepson v. Bank*, 9 Lea, 713; 17 Am. & Eng. Enc. L., 122; also, the English case of the *Gaslight Co. v. Terrell*, L. R., 10 Eq., 168; *Atwater v. Am. Bank*, 40 Ill. App., 501; *Hill v. Knickerbocker Electric Light Co.*, 63 Hun, 632; *Siccardi v. Keystone Oil Co.*, 24 At. R., 163.

By a general assignment which does not prefer the directors, the corporations acts through its proper authorities, on the one side, and its creditors, as such, stand on the other side. It is doing what the law would do for it. But when the directors are themselves creditors, and, as directors, assign to themselves as creditors, we have the same persons acting as buyers and sellers, and it is hard to conceive of an argument in favor of tolerating a preference of a director in such case. The evil can hardly be illustrated better than in the history of this case. Brown owned $82\frac{1}{2}$ and Ormond 46 shares, out of a total of 312. They were creditors and interested to collect their debts. They get three other stockholders, one of whom, the largest stockholder, is also interested as indorser, and these stockholders called themselves together as directors. Without the vote of Brown and Ormond, there would not have been a majority of the stock. The same is true of the directors' meeting—without the vote of Brown and Ormond, there would not have been a majority. Now, the bill squarely presents the question whether a director can vote on the question of preferring his own debt. This question is squarely presented by the bill. That a director cannot do so, is well settled. 1 Morawetz on Corporations, secs. 517, 518, 520. The law must necessarily be thus, or else do violence to plain common sense of right and justice.

McIntosh & McIntosh and Hamm, Witherspoon & Witherspoon, for appellees.

Fortunately, the discussion of the question whether an insol-

Brief for appellees.

vent corporation can make a general assignment with preferences, with the leading courts on the one side maintaining that they can and the text writers on the other that they cannot, has no place with us, for this question has long since been settled in this state by our supreme court, in the case of *Arthur v. The Commercial Bank*, 9 Smed. & M., 429, 430; and this case was recently reaffirmed in the case of *Palmer v. Hutchinson Grocery Co.*, MS. op., s.c. 11 So. Rep., where Judge Cooper says: "Counsel for the appellant concede the correctness of the decree appealed from, if the question involved is to be controlled by former decisions of this court, but argue to show that the decision in *Arthur v. The Commercial Bank*, 9 Smed. & M., 394, in which it was held that an insolvent corporation might make a preferential assignment for creditors should be now overruled and the contrary view adopted. We decline to overrule the decision." Our court, at that early day, after a full discussion, overruled Chancellor Buckner, and placed its decision on the only solid and tenable ground, as it seems to us.

To hold with the text writers that at the moment the corporation becomes insolvent, its property is immediately affected with a trust lien with all incidents of such liens, would be to destroy the usefulness of corporations. The public would have to deal with them at their peril. The moment a trading or manufacturing corporation became insolvent, it would have to stop any further business and close its doors, for the trustee could not make new debts, or new engagements, or new contracts, except such as were absolutely necessary to a preservation of the trust property. This trust doctrine has had its growth and development mainly in the minds of text writers who viewed only one side of the question, and based their opinions solely on the idea of what they believed to be public policy and honesty. They either failed to see, or wilfully ignored, the full consequences of their doctrine, and it will be seen on examination that they use not a single argument that

Brief for appellants.

would not be equally as strong and convincing against the rights of an insolvent individual to make preferences.

The true view of this question is clearly and ably set out in a recent decision of the supreme court of the United States. The effect of this opinion is to overrule a great number of decisions previously made by inferior federal courts which were based on the broad idea that all assets of an insolvent corporation were trust funds in this wide sense. *Hollins v. Brierfield Coal Co.*, 150 U. S. Rep., 381.

The following cases decide the direct question that insolvent corporations may prefer their directors who are *bona fide* creditors: *Planters' Bank v. Whittle*, 78 Va., 737; *Whitwell v. Warner*, 20 Vt., 425; *Buell v. Buckingham*, 16 Iowa, 284; *Warfield v. Canning Co.*, 72 Iowa, 666; *Foster v. Planing Mill Co.*, 92 Mo., 79; *Bank of Montreal v. Potts Salt Co.*, 90 Mich., 345; *Hills v. Furniture Co.*, 23 Fed. Rep., 434; *Smith v. Skeary*, 47 Conn., 54; *Central Railroad Co. v. Claghorn*, 1 Speers' Eq., 545; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; *Leavitt v. Mining Co.*, 3 Utah, 265; *Wilkinson v. Bauerle*, 7 Atl. Rep., 514; *Reichwald v. Commercial Hotel Co.*, 106 Ill., 439.

Miller & Baskin and *Cochran & Bozeman*, for appellants, in reply.

In the matter of the authorities cited by the counsel for the appellee, and relied upon as sustaining their contention that an insolvent private corporation may prefer its directors in a general assignment for the benefit of creditors, we desire to call the court's attention to the fact that nearly all of the cases cited are distinguishable from the case at bar.

In the case of *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep., 496, Justice Harlan distinguishes the cases of *Hollins v. Iron Co.*, 150 U. S., 371; *Buell v. Buckingham*, 16 Iowa, 284; *Smith v. Skeary*, 47 Conn., 53; *Hills v. Furniture Co.*, 23 Fed. Rep., 432; *Bank v. Potts*, 90 Mich., 345, and shows that

Brief for appellants.

they do not sustain the right contended for by appellee. As the court has been referred to the *Sutton Mfg. Co. case*, we deem further comment upon the above authorities unnecessary.

We have been unable to examine Ashurst's appeal, 60 Pa., 290, cited by the counsel for appellee, but we call the court's attention to the later cases of Hopkins' appeal, 90 Pa. St., 76, and Kersteller's appeal (*Sicardi v. Oil Co.*), 149 Pa. St., 139, in which the supreme court of Pennsylvania holds that an officer of an insolvent corporation cannot acquire a preference over its unsecured creditors, "a correct view of the law that is promotive of justice," says the court, "and well sustained by reason and authority. If, on the discovery of insolvency of the corporation, its officers were at liberty to appropriate its entire assets in satisfaction of their demands against it, outside parties dealing with it would be entirely devoid of protection."

Foster v. Planing Mills Co., 92 Mo., 79, involved the validity of a deed of trust executed to secure a debt due a director. It is to be noted that the deed of trust was executed in the usual course of business and for the purpose of continuing the corporate existence and business, and not by way of distribution of its assets.

So, in the case of *Bank v. Potts*, 90 Mich., the court says on page 349, commenting on the facts of the case, "that at the time the mortgages were given, the defendant had not ceased to be a going concern, nor are we satisfied that its officers had abandoned hope of continuing the business." And on page 351: "This mortgage cannot be held to constitute an assignment for the benefit of the creditors. It does not appear that the officers of the corporation had any purpose to make an assignment." And in *Smith v. Skeary*, 47 Conn., 53, the bill of sale in question was executed for a debt due and for other advances to be made in prosecution of the company's business.

The authorities, as we understand them, make a sharp distinction between the validity of mortgages and conveyances executed by the company while it is a going concern and for

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the purpose of continuing its business, and those made on dissolution, holding that in many cases where the former would be sustained, the latter would be void as to creditors.

The gist of the decision in the Whitwell case, 20 Vt., 425, is, as we understand it, simply that stockholders of a corporation who take advantage of their position to secure a debt due from a corporation under an assignment, do not render themselves personally liable to the creditors of the company.

As to the case of *Sargent v. Webster*, 46 Am. Dec., 743 (Mass.), cited in support of appellee's view, Justice Harlan says, in 63 Fed. Rep., 506, that the later Massachusetts cases look the other way.

In *Lexington Ins. Co. v. Page*, 66 Am. Dec., 165, cited by appellee, the preferred creditors were shareholders and not directors, and the Kentucky court draws clearly the distinction between the relation of the shareholder, who has nothing to do with managing the business, and the director in such matters.

So in the case of *Reichwald v. Hotel Co.*, 106 Ill., 439, the preferred creditor was a shareholder and not a director, and the corporation was an Iowa and not an Illinois corporation. The sale complained of was made in settlement of a debt contracted and secured by a mortgage in the course of business, and while the company was a going concern.

And in *Beach v. Miller*, 130 Ill., 170, the court reviews the former Illinois decision on this question, and holds that a sale to a director by an insolvent corporation is void.

Argued orally by *C. H. Alexander*, for appellants, and by *W. R. Harper*, for appellees.

COOPER, C. J., delivered the opinion of the court.

The question involved in this case, as now presented, is not whether an insolvent corporation may, in good faith, prefer creditors, or whether the mere fact that two corporations, each having the same person as president of the board of directors,

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and stockholders common to both, disables one to prefer the other, in good faith, as to a debt due it. These questions have been decided in this state. *Arthur v. Bank*, 9 Smed. & M., 394; *Sells v. Rosedale Grocery Co.*, 72 Miss., 590. Nor is the question what preference may be given a director by a "going" corporation, not in the presence or the prospect of insolvency, or even in that condition, if in consummation of a promise made to obtain means to go on, in just and reasonable expectation of continuing operations successfully, and that if it became necessary for the protection of the creditor a preference would be given him. Nor is it a question as to a stockholder dealing with a corporation. Nor is it the case of an officer who advanced money or credit to the corporation, and was preferred by others of the governing body, without his being a factor in making such preference. Nor does the case involve the question in what sense and to what extent are corporate assets a trust fund in case of the insolvency of the corporation, nor any other of the numerous questions which might arise out of different circumstances in the dealings of corporations. The precise and only question now involved is, may the directors of an insolvent corporation prefer themselves, by devoting its assets to pay debts due them, or debts on which they are bound as indorsers for the corporation? This question has not been before decided in this state, and we have no hesitation to announce that this cannot be lawfully done. To permit it would be to allow those intrusted with the governing power of a corporation to prefer themselves by their own determination and action—a proposition monstrous in the extreme, shocking to the moral sense, and wholly indefensible, as it seems to us. It is a mistake to suppose that in *Sells v. Rosedale Grocery Co.*, 72 Miss., 590, it was held that the directors of an insolvent corporation could lawfully devote the property of such corporation to protect themselves against indorsements they had made. In that case it appears that a majority of the acting body of directors of the insolvent corporation had no interest in the

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bank which was preferred, and the sole point decided, in that aspect of the case, is that the debtor company was not disabled from preferring another by the fact that one man was president of both, and that there were persons who were stockholders in both—a widely different question from that here involved. Here the preference was resolved on and made by the active and potential participation of the beneficiaries of the assignment. By their own act they appropriated for their own benefit the available assets of the corporation of which they were the governing body.

If it be conceded that a corporation in failing circumstances may do what a natural person may, it would not follow that this preference could be upheld, for it was never heard that a natural person might prefer himself by an assignment, general or special, or otherwise. He may prefer others, but not himself. These directors, by their own will and act, preferred themselves, a thing quite natural, but which the law cannot sanction. By their act they practically dissolved the corporation and put an end to its going, and appropriated its property to themselves, thereby destroying forever all chance of realization by other creditors from the continued operation of the corporation. We deem it unnecessary to cite the numerous cases which have more or less bearing on the question discussed. A large number of them have been collected and referred to in Commentaries on the Law of Corporations by Thompson (vol. 5, chap. 146) where quite a full discussion of the subject may be found, and we content ourselves with this reference.

Decree reversed, demurrer overruled, and cause remanded, with leave to answer within thirty days after mandate filed.

WHITFIELD, J., specially concurring.

In the result reached in the decision in this case, I entirely concur. But the expression in the opinion of the court to the effect that the question whether an insolvent corporation may

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make a preferential assignment has been decided by this court, would seem to be aside from decision in this case, and, as assented to, it would seem to commit us to that doctrine still. I write merely to say that, after the most careful investigation and the most mature consideration, I am thoroughly satisfied that all the cases in this state announcing the rule that an insolvent corporation which has ceased to be a going concern, may make, after such *de facto* dissolution, arising from its having ceased to be a going concern, a preferential assignment, should be overruled and the doctrine repudiated. All the cases since *Arthur v. Bank*, 9 Smed. & M., 394, simply trace back to that; and yet, when the opinion in that case is considered, it is transparently clear that the reasoning of the opinion is meager, unsatisfactory, and unhelpful to the last degree. That case was decided in 1848, in (as contrasted with their present development) the comparative infancy of corporations. Fifty years of added judicial observation of the monstrous perversions of justice which constantly result from maintaining this doctrine have already had the effect of breaking most materially the then almost unanimous array of authorities upholding this pernicious doctrine; so that now, while it may be conceded that the numerical weight of authority still asserts the doctrine, an array of authorities not much less in mere number repudiate it. And when the disposition to adhere to the rule of *stare decisis* is considered, especially when the majority of the courts are to be confronted by the court taking the new view, it is not difficult to understand why courts which have (dealing with new conditions and new creations of our complex modern civilization, under the duty of pioneering their way with inadequate light) first erred should afterwards adhere to the error, seeking refuge in the fact that there have been such decisions, instead of keeping steadily in view the pole star by whose light courts should steer—the administration of justice and right—and without sufficiently remembering (what the course of enlightened jurisprudence has, through its whole history, illus-

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trated) that to accomplish this fundamental purpose of the existence of courts of justice, the principles of law must be molded, in the evolution of social conditions and the development of the new agencies of civilization, so as to work out (in the exigencies confronting the courts, growing out of this development) justice and right.

I have thought it proper to observe so much, in deference to the case of *Arthur v. Bank*, *supra*, and the rule of *stare decisis*; not with any purpose of setting forth at large in this—a merely concurring opinion—the reasons which control my judgment. Those reasons may be found set out with profound ability by Judge Thompson in his recent great work on corporations (vol. 5, secs. 6494–6504, inclusive). In my judgment, this argument cannot be answered. It presents the reasoning with a force, completeness, and conclusiveness nowhere else to be found, and in sec. 6496 points out accurately the fallacy of the reasoning of courts upholding the doctrine. Says Judge Thompson: “Although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may by so doing hinder and delay the others, yet he merely hinders and delays them; he does not by that act destroy himself; he still lives; and he may, and often does, get on his feet again, and acquire property, and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the objects of its creation, and dispossesses itself of all its property, it destroys itself, and becomes *ipso facto*, dissolved, and, in fact, is regarded as a dissolved corporation, for many purposes, having reference to the rights of creditors. An assignment for the benefit of creditors is, in point of fact and experience, an end of the corporation; and to this statement there is not one exception in a thousand cases, as every lawyer and judge knows. The corporation, after such a catastrophe, not only has nothing more for its unpreferred creditors, but it never will have anything more for them. Its act of exhausting its assets in pre-

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ferring particular creditors, deprives the others of all remedy, unless in those cases where the law has left them the remedy of proceeding against its stockholders. When a corporation suspends business and makes an assignment, by reason of its insolvency, its situation is analogous to that of an individual debtor under a bankrupt law, which, upon his surrendering his property for the benefit of creditors, discharges him from any further liability for his debts. The individual is discharged *de jure* by operation of the statute of bankruptcy. The corporation is discharged *de facto* by operation of the natural laws of its existence. But the remedy of the creditor is not determined in the one case any more effectively than in the other." I refer also to the very ably-reasoned opinion in *Conover v. Hull*, 10 Wash., 673, s.c. 45 Am. St. Rep., 810. It is a significant fact, too, that all the modern text writers (Morawetz, Taylor, Wait, and others) sustain Judge Thompson's view. And Mr. Freeman, who seems not entirely content with this view, says (45 Am. St. Rep., 832): "There can be no doubt that the doctrine that a corporation, when insolvent, cannot prefer any of its creditors, is gaining ground and finding support in the decisions of some of the courts where, until recently, there was substantial harmony" the other way. I confidently believe that when another decade of judicial observation of the pernicious results of this doctrine (the travesties of justice and outrages upon right flowing from its practical operation) shall have passed, the doctrine so long, so earnestly, and with such persistent faith in the ultimate triumph of principle and right, contended for by Judge Thompson, will be the established law of the land. For the ablest argument in support of the opposite doctrine I have anywhere met with, see the opinion of McClellan, J., in *Jewelry Co. v. Volfer* (Ala.), 17 South., 525, the reasoning in which, however, it seems to me, breaks down just where the stress of the argument is reached.

Statement of the case.

RAND, JOHNSON & CO. v. W. H. PEEL, EXR.

1. ARBITRATION AND AWARD. *Irregularities of arbitrators. Code 1892, ch. 6.*

An award returned into the circuit court by arbitrators appointed under § 112, code 1892, should be vacated when it appears that after the submission of the case the arbitrators heard the unsworn testimony of one party, in the absence of and without the knowledge of the other or his counsel.

2. SAME. *Appeal from award. Procedure. Code 1892, ch. 6.*

On an appeal from an award returned into and approved by the circuit court under § 112, code 1892, the award is dealt with by the supreme court, in the matter of procedure, as having the same effect as a final judgment of the trial court, and, when set aside, the submission falls with it.

FROM the circuit court of Marshall county.

HON. EUGENE JOHNSON, Judge.

There was a reference to arbitrators, under § 112, code 1892 (ch. 6), in the suit brought by J. A. Mathews in his lifetime against Rand, Johnson & Co. About two months after the hearing of the evidence and the submission of the matter, the arbitrators had a second meeting to arrive at and announce their conclusion. At this second meeting the plaintiff, Mathews, and one Ford, defendant's bookkeeper, were sent for and examined in relation to certain items that appeared on an account filed by defendants as a set-off, one of which was disallowed when they made their award. Neither the defendants nor their counsel were notified of this, nor were they present when it took place. Mathews and Ford had testified under oath at the first sitting of the arbitrators, but were not sworn when examined the second time. On the return of the award into court, a motion was made to vacate the same, and the court below having overruled the motion, this appeal was prosecuted.

Opinion of the court.

R. T. Fant, for the appellants.

The hearing of evidence in the absence of one of the parties and his counsel, and without notice to either of them, is good ground for setting aside the award, the case having been submitted on the evidence adduced at a previous sitting of the arbitrators. 1 Am. & Eng. Enc. L., 708; *Sisk v. Garey*, 27 Md., 401; 1 Johns. Chy., 101; 29 Ga., 495; 30 Hun (N. Y.), 29. All the authorities condemn the hearing of *ex parte* evidence. *Lutz v. Linthicum*, 8 Peters, 178; *Elmendorf v. Harris*, 23 Wend. (N. Y.), 628; *Knowlton v. Mickles*, 29 Barb. (N. Y.), 465; *Wilson v. Boor*, 40 Md., 483; *Bushey v. Culler*, 26 *Ib.*, 534; *Hill v. Insurance Co.*, 129 Mass., 345; *Rigden v. Martin*, 6 H. & J. (Md.), 403; *Conrad v. Ins. Co.*, 4 Allen (Mass.), 20; *Strong v. Strong*, 9 Cush. (Mass.), 560; 1 Am. & Eng. Enc. L., 685, 686, 708. The case of *Anding v. Levy*, 60 Miss., 487, is without application to the present controversy, for the court is not asked to review the correctness of the findings of the arbitrators.

Smith & Totten and *W. A. McDonald*, for the appellee.

The submission to arbitration under ch. 6, code 1892, was the voluntary act of the parties to the suit, and the award should only be set aside for fraud or some misconduct on the part of the arbitrators by which the rights of appellants were prejudiced. Code 1892, § 106; *Anding v. Levy*, 60 Miss., 487. The evidence does not show such a case. The witnesses, Mathews and Ford, the latter of whom was appellant's book-keeper, were only sent for to explain three of the items in appellant's set-off which did not appear on their books, and two of the items were allowed. There is nothing in the record that in anywise tends to show that the disallowance of the other item (a cash one of \$100), was improper.

WHITFIELD, J., delivered the opinion of the court.

The motion to vacate the award should have been sustained.

Syllabus.

2 Am. & Eng. Enc. L. (2d ed.), 646, 647, and authorities cited. This being the reference of an action at law, the award falling, the submission falls with it. *Id.*, 813, subd. 19, and note 2. The award in such case is to be dealt with as to procedure here, and have the "same effect as the final judgment of the court into which the award was returned."

The judgment is reversed, the award set aside, and cause remanded.

WIRT ADAMS, STATE REVENUE AGENT, v. CAPITAL STATE BANK.

74	307
86	239

1. MUNICIPAL ORDINANCES. *Construction. Surplusage.*

A municipal ordinance fixing in its first section a rate of taxation on all property, except banks and solvent credits, and by its second section fixing a lower rate on banks and solvent credits, cannot be held to impose the greater rate on banks. The exception in the first section and the second section cannot be treated as surplusage.

2. SAME. *Municipal taxes. Variant rates.*

If a municipality be without power to impose a lesser rate of taxation on a class of property than that imposed on property generally, and yet attempts to do so by ordinance, if the ordinance be not wholly void, the aggrieved parties are those upon whose property the greater burden was sought to be imposed.

3. TAXATION. *Levy. Payment.*

A levy of a tax is indispensable to create a legal obligation to pay it. A taxpayer who has paid all taxes undertaken to be imposed upon his property, is not in default for not having paid more thereon.

4. CONSTITUTION. *Statutes.*

An act of the legislature should never be held to be violative of the constitution, unless the right of a litigant in the case before the court requires it to be done.

Brief for appellant.

FROM the chancery court, first district, of Hinds county.

HON. HENRY C. CONN, Chancellor.

The court below having entertained jurisdiction of this case, the question as to whether it were or were not equitable in character did not arise in the supreme court, by reason of the provisions of sec. 147, constitution of 1890, which provides: "Section 147. No judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of the want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction; but if the court shall find error in the proceedings other than as to jurisdiction, and it shall be necessary to remand the case, the supreme court may remand it to that court, which, in its opinion, can best determine the controversy."

The facts appear in the opinion.

Mayer & Harris, for appellant.

The ordinance, as set forth in the record adopted by the city, made a levy which was extended by its very terms over all of the taxable property of the city, and the subsequent attempt in the ordinance to except banks out of that general levy, was a simple nullity. It did not so except out of the operation of the general levy banking property, and did not operate to qualify or restrain the operation of the general levy. It was pure surplusage under the operation of the doctrine, *utile per inutile non vitiatur*. The simplest rhetorical analysis of the ordinance will show this is true. It is easily and simply severable into two distinct portions. First, there is the portion making the general levy and extending the same over the taxable property of all the city, and that including all of the taxable property in the municipality, except such as was exempt by operation of law. Then comes the attempt to except out of the operation of this general levy, as a distinct movement or

Brief for appellee.

mental operation, or consideration, the special property of banks and solvent credits. The board being without authority to make any such exception, their attempt to do so is a simple nullity. It is not a case in which there never has been any levy, as contended for. It is a case in which there was a levy; and the law does not require that in making a levy the board shall have present in its mind a distinct mental conception of every piece of property on which, and to which, the levy, when made, shall rest and attach. The making of the levy is done by the general declaration that the sum of so many mills *ad valorem* is fixed upon the property of the city; and the exception whereby it was attempted to narrow and restrain is within the operation of the maxim cited above. That maxim has been applied under all sorts of conditions. In *Grand Lodge v. New Orleans*, 46 La. Ann., 717, it was applied to a constitutional provision. In *Sneadon v. Harris*, 27 Fla., 245, it was applied to a verdict. In *re Upchurch*, 38 Fed. R., 25, it was applied to an act of congress. In *Crawley v. Commonwealth*, 123 Penn. St., 275, it was applied to a bond. In *Gibbs v. Wall*, 10 Col., 153, it was applied to a bill of exceptions. See, also, *Fletcher v. Massey*, 49 Ill. App., 36; *Robertson v. Commonwealth* (Va.), 20 S. E. Rep., 362; *Stewart v. Collier*, 91 Ga., 117; *State v. Hanger*, 5 Ark., 412; 1 *Desty on Taxation*, 198; *St. Mary's, etc., v. City New Orleans*, 47 La. Ann., 205.

Brame & Alexander, for appellee.

The revenue agent is a mere collector. He has no power to assess or levy taxes. If a levy is not made, steps may be taken to enforce the performance of duty on the part of the officers who should make the levy; or, if an improper or insufficient levy is made, the remedy is by appeal. In the matter of a tax sale, it has often been held that there are three fundamental things necessary to be shown: (1) A valid assessment, (2) a valid levy, and (3) a legal sale. We doubt if the power could be conferred upon a revenue agent to make a levy *nunc pro*

Brief for appellee.

tunc where no levy has been made. But whether this is true or not, we submit that the act of 1894, under which the revenue agent is authorized to bring suits (Laws, 29) does not include a case of this kind. In order to confer power upon a revenue agent to sue in any case, there must be express legislative authority. It is not pretended that there is any provision in the act of 1894 authorizing the revenue agent to bring this suit unless it is to be found in the general provision that he may sue in all cases where the municipality might sue. This case does not come within the contemplation of that provision of the statute. It will hardly be contended that there is any authority for a municipal corporation to bring innumerable suits against taxpayers who have failed to pay taxes, and especially where the same have never been levied. If this could be done, why not dispense with all assessments and levies and collect all taxes by suits? As to the strict construction applicable to the power of the revenue agent in cases of this character, we refer to *The State v. Adler*, 68 Miss., 487; *Thibodeaux v. State*, 69 Miss., 683; *State v. Vicksburg Bank*, 69 *Id.*, 99. That the levy of a tax is a fundamental requirement, see *Virden v. Bowers*, 55 Miss., 1.

Calhoon & Green, on same side.

The truth is, the question involved is not one of revenue, but one of discrimination, and with that question we confidently assert that the state revenue agent has nothing to do. The necessary revenue was had. Discrimination is the only complaint remaining, and neither the city nor the agent can complain of this. Only a taxpayer can, and he only by appeal. It cannot be disputed that a municipality is powerless to levy a tax or collect a tax without express legislative authority. No legislative authority, no municipal tax. A void legislative authority, a void levy, and this to the amount unauthorized. If the tax be limited to six mills when it should or might have been fourteen and a half mills, then the levy is, or collection is,

Brief for appellee.

certainly void as to the difference, if not *in toto*. If no authority to levy any tax, may the city levy? The question is not what the legislature should have done, but what it actually did do.

In the case at bar there were only two parties to the judgment, namely, the municipality—that is, the body of taxpayers—on the one side, and the Capital State Bank on the other, and neither appealed or is now complaining. The mayor and board of aldermen was simply the court which decided between them. The assessor, representing the municipality—the body of the taxpayers—presents his roll. Here is the actor. The Capital State Bank is supposed to be present. Here is the *res*. Where is the court? Why, the mayor and board of aldermen, of course. Here, and only thus, do we have the indispensable constituents in the disposition of causes—a plaintiff, a defendant, and a court. The court can never be aggrieved; it can never appeal from or collaterally attack its own judgment. The city, by its board, was the court. The city, through its taxpayers, might appeal, but the time has elapsed. The bank might appeal, but the time has elapsed. The court never can complain in any way or anywhere that its own judgment is a nullity, and, if it cannot, neither can the revenue agent. If the municipal court might proceed at all, very manifestly it could only do so by a reconvention and a new levy. But it is powerless to do this. It can act only under the authority of some law, and no statute can be found empowering a levy in one year for antecedent years.

The position that the general assessment and general judgment are valid, but the exceptions as to banks or solvent credits is void, is not tenable. It is difficult to conceive of a judgment of this kind being partly valid and partly void. This might be urged with some plausibility if there was any voidness about it, if only the first clause of the city ordinance making the levy stood by itself. The first section of that ordinance imposes the annual tax on all property “except” banks and solvent credits,

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but, as a distinct judgment of levy, section 2 of the ordinance distinctly fixes the levy upon them, and, undoubtedly, that is the judgment which affects the defendant, and from which neither he nor any taxpayer appealed, and is conclusive in this case as to the parties to this suit, even if the act and ordinance were unconstitutional. *Barings v. Dabney*, 19 Wall., 1.

Argued orally by *Edward Mayes* and *J. B. Harris*, for appellant, and by *S. S. Calhoun* and *L. Brame*, for appellee.

All the counsel argued the constitutional question elaborately in their briefs, but, as the court did not decide the same, such parts of the briefs are wholly omitted from this report.

THOMPSON, Sp. J., delivered the opinion of the court.

This suit was instituted by the revenue agent, a state officer, who, under the provisions of law (Laws 1894, 29-31, sec. 2), has power "to proceed by suit . . . against all officers, county contractors, persons, corporations, companies, and associations of persons for all past due and unpaid taxes of any kind whatever, for all penalties or forfeitures, for all past due obligations and indebtedness of any character whatever owing to the state, or any county, municipality, or levee board, and for damages growing out of the violation of any contract with the state, or any county, municipality, or levee board." And he is given a right of action in all cases where the state or any county or municipality or levee board has the right of action or may sue. It is averred in the bill of complaint that the city of Jackson levied an *ad valorem* tax of fourteen and one-half mills upon each dollar of the valuation of taxable property in said city for the municipal taxes of 1894, and thirteen mills for the year 1895; that the appellee was the owner of a large amount of taxable property in the city during each of said years, and that for the year 1894 it only paid six mills upon the dollar of the valuation of its property, and five mills for the year 1895. These payments, it will be noticed, equaled

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the state tax for said years. The suit is to recover the balance of the taxes which, it is claimed, should have been paid by appellee for said years to the city. The ownership of property by the appellee and its assessment for each of said years is not disputed, nor is it denied by the appellee that its payments for said years were only of six and five mills respectively, as shown in the bill of complaint. The only contest is upon the levy of the taxes. For the year 1894 the levy of municipal taxes was, by ordinance, in the following words:

“SECTION 1. *Be it ordained by the mayor and board of aldermen of the city of Jackson, That an ad valorem tax of 14½ mills on the dollar is hereby levied on all property assessed for taxation in the city of Jackson, except banks and solvent credits, to be apportioned among the several funds for the purposes following: For general purposes, 5 mills on the dollar; for school purposes, 2½ mills on the dollar; for light purposes, 2 mills on the dollar; for water purposes, 2½ mills on the dollar; for bond and interest purposes, ½ mill on the dollar; for fire purposes, ¼ mill on the dollar; for turnpike purposes, 1 mill on the dollar. Total, 14½ mills.*

“SEC. 2. *An ad valorem tax of 6 mills on the dollar is hereby fixed and levied on banks and solvent credits, to be apportioned to the several funds above mentioned, on the basis of a tax of a 14½ mills levy.*

“SEC. 3. *This ordinance shall be enforced from and after its passage.*”

The levy of the city taxes for the year 1895 was by an ordinance in practically the same words, admittedly of the same legal effect, the only variance being in the date of passage and the sums levied. No point is made on the date of the passage of either, and the levy for 1895 was thirteen mills on property generally and five mills on banks and solvent credits.

It is contended by appellant that these ordinances are in legal effect a levy of fourteen and one-half mills and thirteen mills respectively upon the dollar of the valuation of all taxable

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property in the city, and that the words "except banks and solvent credits," in the first section, and the whole of the second section, in each of said ordinances, are mere surplusage, and that the court below should have treated and this court must treat the ordinances as if these words and the second sections were no part of them, and the maxim, "*Utile per inutile non vitiatur*" is invoked as applicable.

It is argued that the concluding clause of the revenue act of 1894 (Laws 1894, pp. 21-25, sec. 3), which provides that "no city or town shall impose or collect a greater tax on banks or solvent credits than the state tax for the same year," is unconstitutional and void, and that the municipal authorities, in the passage of the ordinances, must not be credited with an intention to levy one tax upon certain classes of property and a different one on all other classes; that all parts of said ordinances from which such an intention can be inferred, or is sought by appellee to be inferred, must be rejected as surplusage. This contention is denied, and thus the point for decision is presented.

The question for this court is this: What was the true intent and purpose of the municipal legislative mind in the adoption of these ordinances? We do not think it justifiable to ignore that part of the first sections of the ordinances and the second sections, which we are asked to treat as surplusage. The whole of each of the ordinances must be considered in determining their meaning and legal effect. That surplusage may be rejected in construing a writing is certainly true, but the very definitions of the term exclude the rejection contended for here. Surplusage is defined in Anderson's Law Dictionary as "matter, in any instrument, foreign to the purpose; whatever is extraneous, impertinent, superfluous, or unnecessary." Webster's International Dictionary defines the term as used in law thus: "Matter which is not necessary or relevant to the case, and which may be rejected." The Standard Dictionary so defines it as "matter in any instrument that is not necessary to

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its meaning, but does not affect its validity." We have carefully read and considered each of the cases cited by appellant's attorneys (to be found in the state library) applying the maxim "*Utile per inutile non vitiatur*," and other decisions on the subject, but do not find warrant in any of them for its application to the question before us.

If that part of the revenue act of 1894 the constitutionality of which is questioned, be valid, of course the levies were regular and made in appropriate language. If, however, the law be unconstitutional, then the ordinances, we think, must be construed as if the law had never been passed. Looking at the plain language of the ordinances, we cannot escape the conclusion that it was not the intent of the city authorities to impose the same rate of taxation on all classes of taxable property. When we consider that the municipal legislature was most likely endeavoring to carry the provision of the revenue law of 1894 into effect, we cannot doubt but that it was the design of the ordinances to impose a different rate of taxation on banks and solvent credits from that which it imposed on other taxable property.

Assuming the law in question unconstitutional, for the sake of the argument, and the whole of appellant's contention is predicated of that idea, we have the authorities of the city of Jackson levying a municipal tax for 1894 of six mills on the dollar on the valuation of banks and solvent credits, and a tax of fourteen and one-half mills upon the valuation of all other taxable property; and for the year 1895 a like levy, variant only in amounts. In such case, however wrong in principle or even invalid the ordinances may be, can it be said that a taxpayer who has paid all taxes undertaken to be imposed upon his property, is in default for not having paid more thereon? We think not. If it be that the municipal authorities were without power to levy a tax upon a class of property and another and greater tax upon the balance of the taxable property in the city, it would follow that the ordinances in question are

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either entirely void, or that the aggrieved parties are those upon whose property the greater burden was sought to be imposed. In this case we do not think that any greater municipal tax was levied upon banks and solvent credits than that which is shown to have been paid. A levy of a tax is absolutely indispensable to create a legal obligation to pay it. A tax must be due and unpaid; and this in case of taxation of property can only be shown by proof that the property was assessed, listed, and valued, and that the tax was in fact levied by competent authority. It follows from these views that the decree of the court below must be affirmed.

We are asked by counsel on both sides to consider and decide the constitutional question which was argued before us. While the court would be pleased to comply with the request, yet we are constrained by our sense of duty to deny it. In the case of *Thompson v. The Grand Gulf Railroad & Banking Co.*, 3 How. (Miss.) 240, Chief Justice Sharkey, in delivering the opinion of this court, said: "To determine between the constitution and the legislature is often embarrassing, and always demands a cautious and deliberate investigation. In the inquiry is involved the highest function of the judicial department. The acts of the legislature should be sustained, if possible; the constitution must be preserved inviolate." While the obligation rests upon the courts to fearlessly see that the constitution is preserved, still wisdom requires that they should proceed in such matters cautiously, and we think an act of the legislature should never be held to be violative of the fundamental law unless the right of a litigant in the particular case before the court requires it to be done. We are fortified in this conclusion by the opinion of Judge Cooley, who, in his work on *Constitutional Limitations*, page 163, says: "While the courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more

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proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled. In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable."

Decree affirmed.

MARSHALL COUNTY v. JACK TIDMORE.

74 317
194 390

PRACTICE. *Witness fees. Commitment. Per diem allowance. Code 1892, §§ 1987, 2023 to 2026 inclusive.*

A witness for the state in a criminal prosecution who has been committed to jail to secure his appearance before the circuit court, is not, under §§ 1987 to 2026 inclusive, code 1892, entitled to a per diem allowance of fees for the whole period of his detention, but only for that covered by his attendance upon the court when in session.

FROM the circuit court of Marshall county.

HON. EUGENE JOHNSON, Judge.

This cause originated in the *ex parte* application of the appellee for an allowance of his fees as a witness for the period of his detention in jail, the whole time being two hundred and three days. The court made an order of allowance upon the county treasury for the sum of \$216, in payment of appellee's claim, whereupon, the county appealed. The motion was tried upon the following agreed statement of facts: "One J. S.

Brief for appellant.

Gatlin shot and killed one Ed. West, at Potts Camp, Mississippi, in Marshall county; that the said Tidmore was present, and was an eyewitness to said killing; that said Gatlin made his escape and is still at large, never having been apprehended; that said Tidmore was a transient person, and at the coroner's inquest held upon the body of said West, he was required to give bond to appear before the August term, 1895, of the circuit court of said county as a witness before the grand jury; that said Tidmore was unable to give bond, and was sent to jail to await the sitting of the circuit court; that on August 31, 1895, an indictment was found against said Gatlin, and said Tidmore was again required by the circuit court of said county to give bond for his appearance as a witness against said Gatlin at the February term, 1896, of the circuit court of said county; said Tidmore was unable to give this bond, and, in default, was at once committed to the county jail, where he remained until the February term, 1896, of the circuit court of said county, when, said Gatlin being still at large, said Tidmore was discharged from jail on his own recognizance; at which time he was allowed by the court the sum of \$14.80 for his attendance during the actual sitting of that term of the court, the same being for nine days' attendance and twenty-six miles traveled. Said Tidmore was in jail twenty-three days from the time of the holding of the coroner's inquest until the convening of the grand jury of the circuit court, 1895, and one hundred and eighty days from that time until he was discharged on his own recognizance; that is, he was confined in jail from the August term, 1895, of court until the February term, 1896."

Smith & Totten, for the appellant.

The legislature has failed to make any provision whatever for payment of fees to a witness held under the statute, as in this case. There was no court in session during one hundred and eighty days of Tidmore's confinement for him to attend, and certainly the statute provides for no compensation to wit-

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nesses not in actual attendance upon court. As he was not in actual attendance during vacation, he can claim nothing. *Markwell v. Warren County*, 53 Iowa, 422.

WHITFIELD, J., delivered the opinion of the court.

The court erred in allowing appellee the witness' fees for the time he was confined in jail. The plain declaration of the law (see §§ 1987, 2023-2026, code 1892) is that only the fees prescribed by the statute shall be allowed. The attendance meant by the statute, clearly, is attendance upon the court when in session. Learned counsel for appellee cite two cases (*Robinson v. Chambers*, 94 Mich., 471, 54 N. W., 176; and *Higginson's case*, 1 Cranch C. C., 73, Fed. Cas. No. 6471) which directly support his contention, and two others (*Hutchins v. State*, 8 Mo., 288, and *State v. Stewart*, 4 N. C., 524; 1 Car. Law Rep., 138) which in principle support it, but which, as they relate to mileage, are of no authority here, § 2023 providing that the only mileage allowed here is that for distance traveled within this state.

We cannot assent to the view announced in these cases. In the first two the witnesses were women, and whether gallantry towards the sex or the hardness of the cases, or both together, constrained the court, we think them unsound. The court expounds the law. It neither makes nor modifies it. Doubtless provision should be made by the legislature for cases like the extraordinary one at bar. But that is for the legislature alone. All the cases relied on by learned counsel for appellee, and others, are set out and properly discriminated in the note to *Robinson v. Chambers*, *supra*, in the twentieth volume of the Lawyers' Reports Annotated, at page 57, a series absolutely invaluable to bench and bar.

The true view (the exactly opposite doctrine to that maintained by counsel for appellee) is announced in *Markwell v. Warren Co.*, 53 Iowa, 422 (5 N. W., 570), where the witness was confined in jail, in exactly the same state of case as here,

Syllabus.

for ninety-five days. We concur in the result there announced. The court there said: "It cannot be claimed that defendant was in attendance upon the court while in jail. His confinement was to secure his attendance when court should convene." This certainly is sound, without reference to the other reason given by the court (as to which we say nothing), to the effect that he was confined, not because he could not give bond, but because the magistrate "must have found that the witness would not discharge the duty he owed to the state, of voluntarily appearing to testify." Our view is that the statute does not provide for the case, and we cannot allow what the statute does not warrant. The other fees allowed were proper. As to the fees for the one hundred and eighty days, the judgment is reversed, and judgment here accordingly will be entered. So ordered.

HOPE OIL MILL, COMPRESS & MANUFACTURING CO. v. PHOENIX
ASSURANCE CO.

1. INSURANCE. *Interest in property.*

Whoever may be fairly said to have a reasonable expectation of pecuniary advantage from the preservation of property, whether personally or as the representative of others, has an insurable interest therein.

2. SAME. *Privilege tax.*

In case of suit on a policy issued to a person so interested in the property, it is not a defense that other persons having an interest therein acquired their interest in the course of a business subject to a privilege tax due and unpaid.

3. SAME. *Interest of others.*

It is not a defense to such a case that certain other parties who might have been interested in the property suffered no loss by its destruction.

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4. SAME. *Other insurance.*

In such case it is not a defense that other persons having an interest in the property had taken out further insurance.

5. SAME. *False statements.*

Statements of the insured relative to other insurance relate only to insurance taken by him where there is no inquiry concerning insurance by others.

6. SAME. *Special interest.*

The insured whose interest in the destroyed property was special can sue for whatever interest he owned and for the amount due other owners, which amount, when recovered, will be held by him in trust for such owners.

FROM the circuit court of Monroe county.

HON. NEWMAN CAYCE, Judge.

The appellee issued to the appellant a policy of insurance against loss by fire "on cotton in bales held for compression or compressed, but not loaded upon cars, and for which a compress shipper's receipt has been issued, for Mobile & Ohio, Illinois Central, or Kansas City, Memphis & Birmingham railroad companies, while contained on the open platform and under sheds of the Hope Oil Mill, Compress & Manufacturing Company, Aberdeen, Miss., loss, if any, payable to said railroad companies as their several interests may appear at the time of the fire." The policy further provided: "And it is agreed that this company shall be liable only for such proportion of the whole loss as this insurance bears to the cash value of the whole property hereby insured at the time of fire. Other concurrent insurance permitted without notice until required." A loss having occurred, the appellant sued upon the policy. The averments of the declaration material to the questions decided by the court are stated in the opinion. The fourth, sixth, seventh, eighth, ninth and tenth pleas referred to in the opinion were as follows:

"4. For further plea in this behalf, defendant says that as to

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any claim of the Prairie Cotton Company based on the contract for their benefit, that same cannot be maintained, for the defendant says that the Prairie Cotton Company is a firm composed of John Owens and William Fowler, who were, at the time of said fire, and at the time of said contract of insurance, engaged in the business of buying cotton without having first paid the tax as required by the laws of the state of Mississippi. And this the said defendant is ready to verify.

“ 6. For further plea in this behalf, defendant says that plaintiff's action cannot be maintained, because neither the Mobile & Ohio, Illinois Central, nor Kansas City, Memphis & Birmingham railroad companies sustained any loss or damage by the fire mentioned in said plaintiff's declaration, nor did either of them incur any liability by reason of said fire and damage and loss to the cotton mentioned in plaintiff's declaration. And this the said defendant is ready to verify.

“ 7. For further plea in this behalf, defendant says that, at and before said fire, the Prairie Cotton Company was the owner of the cotton mentioned in the plaintiff's declaration, and said cotton had not been shipped to plaintiff's press over either the Mobile & Ohio, Illinois Central, nor Kansas City, Memphis & Birmingham railroad companies, but had been bought by the Prairie Cotton Company from individuals, who had stored same with plaintiff as warehouseman; and afterwards said cotton was compressed by plaintiff for said Prairie Cotton Company; but, at and before the time of the fire mentioned in plaintiff's declaration, the Prairie Cotton Company was neither ready to ship same over either of the three railroads mentioned in the said policy of insurance, nor had they determined over which of said lines they would ship said cotton in the future, nor to what point they would ship same, and same at the time of fire was held by the First National Bank of Aberdeen, Miss., as a security for a debt due them by said Prairie Cotton Company. Wherefore defendant says that it is not liable under its policy of insurance mentioned in plain-

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tiff's declaration for any damage or loss to said cotton. And this the said defendant is ready to verify.

" 8. For further plea in this behalf, defendant says that, in addition to the insurance mentioned in plaintiff's declaration as being on said cotton, that same was also covered by insurance, which was placed thereon by the Prairie Cotton Company for the benefit of said company, and was in existence at the time of said fire. Wherefore defendant's liability, if any, is not the sum stated in plaintiff's declaration, but is, if any sum, the sum of \$——, being the sum said insurance policy bears to the whole insurance, whether valid or not, or by solvent insurers, covering said property. And this the said defendant is ready to verify.

" 9. And for further plea in this behalf, defendant says that the policy of insurance in plaintiff's declaration mentioned, expressly stipulated that this entire policy shall be void in case of any fraud or false swearing by the assured touching any matters relating to this insurance, or the subject thereof, whether before or after loss. Defendant avers that after said fire plaintiff prepared its proof of loss, and in same swore that said cotton was only insured for the sum of \$37,000, and that the property insured belonged, at the time of the fire, to the Hope Oil Mill, Compress & Manufacturing Company, as bailees, for the use of the various shippers and the several railroad companies named therein, as their several interests may appear, and that there was no incumbrance thereon at the time of the fire. Whereas, said cotton was insured for more than \$37,000, being partially covered by insurance placed thereon by the Prairie Cotton Company, and said cotton was, at the time of said fire, pledged to the First National Bank of Aberdeen, Miss., as collateral security for an indebtedness due it. And this the said defendant is ready to verify.

" 10. And for further plea in this behalf, defendant says that the said policy of insurance in plaintiff's declaration mentioned was taken out by plaintiffs in accordance with its written

Brief for appellant.

agreement with Mobile & Ohio, Illinois Central, and Kansas City, Memphis & Birmingham Railroads, for the benefit of said railroad companies, or either of them, and not for the protection of individual holders of cotton who might have cotton in plaintiff's sheds or platforms, compressed or uncompressed, and who might become in the future shippers of said cotton over one of the three railroads above named. And this the said defendant is ready to verify."

Sykes & Bristow, for appellant.

The main point in the case, the sustaining the demurrer visited back on the declaration, is disposed of in a few words. The court will bear in mind that the party insured in this case, the party with whom the contract is made, the party from whom consideration moves, is the appellant, whom the Phoenix Assurance Company, by the very terms of the policy, "insures against all direct loss or damage by fire, to an amount not exceeding \$2,500, to the property named. The defendant's counsel take the singular and anomalous position that the party primarily insured, the party making the contract, the party paying the premium, is the only party connected with the transaction that has not now, and from the beginning never has had, a particle of interest in the policy, while certain railroad companies, only incidentally and conditionally insured, are the only parties who have ever had any interest in the policy.

The compress company, being, by contract between the plaintiff and the Prairie Cotton Company and the three railroads named, as averred in the declaration, liable to all parties whose cotton it holds for compression or after compression for loss thereof by fire, takes out the policy of insurance thereon for its own protection. The property insured is described as "cotton in bales held for compression or compressed, but not loaded on cars, and for which a compress shipper's receipt had been issued," for the three railroads named, while on the compress premises.

Brief for appellant.

Counsel for the appellee run the relative expression "for the Mobile & Ohio, Illinois Central, or Kansas City, Memphis & Birmingham railroad companies" clear back through four distinct clauses or divisions in the sentence, so as to make it read: "Cotton in bales held for compression for the said three railroad companies, or compressed for the said three railroad companies, but not loaded upon cars for the said three railroad companies, and for which a compress shipper's receipt has been issued for the said three railroad companies."

We contend that the natural, sensible, and grammatical construction of the sentence is to confine the relation of the relative clause to the clause immediately antecedent, so as to make the sentence read: "Cotton held for compression or compressed, no matter for whom, only provided it is not yet loaded upon cars, and provided a compress shipper's receipt for the cotton had been issued for the three railroads named" (or any one or more of them), provision being made further on for the respective claims of the three railroad companies. We confidently submit it to this court to say which is the correct and obvious construction of this clause, which would best carry out the plain intention of the parties to the contract, and look most like business. Can it be contended that the only cotton insured in this policy is cotton belonging to the railroad companies, as claimed by the defendant's counsel? How much more reasonable and sensible to make it apply to all cotton (subject to all the restrictions named), for which compress shipper's receipts have been issued for the railroad companies named. Would not this appear most businesslike with reference to the business of a common carrier?

With reference to the demurrer of plaintiff to the several pleas of the defendant, a very few words will suffice. The sixth, seventh, and tenth pleas raise only the question that was raised by the visiting of the demurrer back to the declaration, which question we have just considered. The fourth plea sets up the failure by the Prairie Cotton Company to pay the re-

Brief for appellee.

quired privilege tax. As the Prairie Cotton Company is not a party to this contract of insurance, we cannot see how its failure to pay its privilege tax can be held to avoid this contract. The eighth plea goes only to the amount of the defendant's liability. If some third party has taken out additional insurance on the same cotton, unknown to, and unconnected with, the plaintiff, how can the plaintiff be affected thereby in its settlement with the insurance company? The ninth plea sets up false statements made by the plaintiff in its "Proof of Loss" rendered defendant after the fire. The statement by the plaintiff as to the additional insurance, of course refers to the insurance effected by it on the cotton. How on earth could the plaintiff be expected to swear as to the insurance taken by third parties, strangers?

Houston & Reynolds, for appellee.

The sole question on this appeal is, can appellant recover under its contract of insurance with appellee for cotton destroyed by fire when said cotton was owned by the Prairie Cotton Company, but held by appellant, who had assumed the risk of loss by fire and was authorized by private contract to claim and collect the amount of insurance? This question is determinable by the construction of the contract of insurance in this case. Of course loss for property destroyed, and which is embraced within the terms of this policy, can alone be recovered. The terms do not embrace cotton of Prairie Cotton Company upon which the compress company had assumed all risk, even though a compress shipper's receipt had been issued for Prairie Cotton Company, because the policy only covers cotton for which a compress shipper's receipt had been issued for Mobile & Ohio, Illinois Central, or Kansas City, Memphis & Birmingham railroad companies. The property covered by the policy is "cotton in bales, held for compression or compressed, and for which a compress shipper's receipt has been issued, for Mobile & Ohio, Illinois Central, or Kansas City,

Brief for appellee.

Memphis & Birmingham Railroad Company.” The cotton must be held for compression, or compressed, for one of these railroads, and not for Prairie Cotton Company, and shipper’s receipt must be issued for one of these railroads, and not for the Prairie Cotton Company, in order to be covered by this policy. This cotton which was burned and sued for here was cotton of the Prairie Cotton Company. There is no allegation that either of the railroad companies had issued their bill of lading for it, or had any interest therein, and, until they did so, they incurred no liability for loss of same. The policy is, “Loss, if any, payable to said railroad companies as their interest may appear at the time of fire”—that is, if none of the railroad companies appear to have any interest at the time of fire, then there is no liability under the policy, for it is only to the railroad companies that the loss is payable as their several interests may appear. There is no allegation in the declaration that either of the three railroads named in the policy has any interest. This policy was not intended to cover cotton delivered to the compress company by private individuals to be compressed for them, but was only intended to cover cotton which the railroads had delivered to the compress company to be compressed for and on their account, and for which they had given their bill of lading and would have been liable for as common carriers in the event of its loss. To justify the construction placed on the contract by appellants, the court must first interpolate into the contract the words “for shipment over” after the words “compress shipper’s receipt has been issued for,” making it read as follows: “On cotton in bales held for compression, or compressed, and for which a compress shipper’s receipt has been issued, for shipment over Mobile & Ohio, Illinois Central, or Kansas City, Memphis & Birmingham,” etc., and the court would also have to insert in the contract “loss, if any, payable to individuals and railroad companies as their interest may appear at the time of fire.”

Opinion of the court.

WHITFIELD, J., delivered the opinion of the court.

It is said in May on Insurance, sec. 80 (2d ed.): "Whoever may be fairly said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally or as the representative of the rights or interests of another, has an insurable interest. . . . And pledgees, innkeepers, factors, common carriers, wharfingers, pawnbrokers, warehousemen, and generally persons charged either specially by law, custom, or contract with the duty of caring for and protecting property in behalf of others as having a right so to protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have or have not any title to, estate in, lien upon, or possession of it, have an insurable interest." See, also, page 651 and section 445, where it is said, treating of nominal and real claimants, that "the name of the insured may not be stated in the policy, as it need not be." See, as clearly and strongly stating the doctrine, *Eastern Railroad Co. v. Relief Fire Insurance Co.*, 98 Mass., 423; 11 Am. & Eng. Enc. L., 316, 317; *Roberts v. Firemen's Insurance Co.*, 165 Pa. St., 55, s.c. 44 Am. St. Rep., 642; *California Insurance Co. v. Union Compress Co.*, 133 U. S., 387, a case to which we especially refer, and *Rochester Loan & Building Co. v. Liberty Insurance Co.* (Neb.), 48 Am. St. Rep., 750.

In *Fire Insurance Association v. Merchants & Miners' Transportation Co.*, 66 Md., 347, it is said further: "The law is now well settled that when a person has the custody, care, or possession of property for another, and bears the relation to it of consignee, carrier, factor, warehouseman, or bailee, he may, though he has no pecuniary interest therein, and is not responsible for its safe-keeping, insure it in his own name for the benefit of the owners, and the insurance will inure to their benefit upon the subsequent adoption of the insurance, even

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after the happening of a loss under the policy." The party insuring in such case may sue for and recover the whole loss, holding the excess over his own interest in the property for the benefit of those who have intrusted the goods to him. 133 U. S., 387, *supra*. See, also, *Traders' Insurance Co. v. Pacaud* (Ill. Sup.), 41 Am. St. Rep., 358; *Waring v. Insurance Co.*, 45 N. Y., 606, s.c. 6 Am. Rep., 146.

Let us test the case in hand in the light of these principles. The declaration avers that "on October 28, 1895, there were held by the plaintiff for compression, and compressed but not loaded on cars, and for which compress shipper's receipt had been issued, for the several railroads before herein named, to be shipped for and on account of the Prairie Cotton Company, of Aberdeen, Miss., and to be delivered to its consignees at the points of destination," etc. The declaration further avers that "at and before the time of the said fire it had been agreed by and between this plaintiff and the said several railroad companies and the said Prairie Cotton Company that this plaintiff assumed all the risk of loss on the said cotton by fire, and should be allowed and authorized to claim and collect from the said defendant and other insurance companies having policies as aforesaid on said cotton, the amount of insurance due thereon," etc. It further appears from the declaration that the plaintiff made the contract with the defendant, and paid the premiums, and that the defendant insured the Hope, etc., Company, for the term of three months, against all direct loss or damage by fire, etc., on the property, to wit: "Cotton in bales, held for compression, or compressed but not loaded on cars, and for which a compress shippers' receipt has been issued for Mobile & Ohio, Illinois Central, or Kansas City, Memphis & Birmingham railroad companies, while contained on the open platforms and under sheds of the Hope Oil Mill Compress & Manufacturing Company, Aberdeen, Miss.; loss, if any, payable to said railroad companies as their several interests may appear at the time of the fire." We do not think the word "for" in this

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policy, in this connection ("for which," etc.) is used to indicate ownership of the cotton, but simply the lines over which it is to be routed. We understand the terms of this policy to cover all cotton held by the plaintiff for any owner, situated as described, etc., for which compress shippers' receipts had been issued for shipment over these railway lines, or any of them. Whether these companies might sue, had the cotton been theirs, as carriers, is not material to the right of the bailee (the cotton being the property of other owners) to sue for any interest it may have, by way of charges or otherwise, and for the amount due owners, which amount would be held by it, when recovered, in trust for such owners. That this suit is properly brought is clear. Ostr. Ins., secs. 277, 278, 280, 282. It is not necessary to go into the question of the distinct rights and distinct subjects of insurance, which, in some cases, under special policies, are held to exist in the owner and the mortgagee, where slips such as this one are inserted in the body of the policy. See, as to this, *Phoenix Insurance Co. v. Omaha Loan & Trust Co.* (Neb.), 25 L. Rep. Ann., 679, and note thereto. It would seem that the plaintiff, the Union Compress Company, in the case in 133 U. S. (see page 393, at bottom), had given the owners receipts "which provided that the plaintiff should not be liable for the loss of the cotton by fire," and a recovery was had. In the policy in this case it is also stipulated that "if, with the consent of this company, an interest under the policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance, other than the interest of the insured," etc., seeming distinctly to recognize the plaintiff's interest as the original assured, and such other interests as different, and as contingently arising.

Applying the foregoing principles to the case in hand, we think the court erred in extending the demurrer back to the declaration, and holding that it stated no cause of action. The demurrer to the fourth plea should have been sustained, because the contract was not made with the Prairie Cotton Com-

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pany, and, in the light of what has already been said, obviously the demurrers to the sixth, seventh, eighth, ninth and tenth pleas should have been sustained.

The judgment is reversed, the demurrers to defendant's said sixth, seventh, eighth, ninth and tenth pleas sustained, and the cause remanded.

WIRT ADAMS, STATE REVENUE AGENT, v. KANSAS CITY,
MEMPHIS & BIRMINGHAM RAILROAD COMPANY.

RAILROADS. Stock law. Landowner. Right of way. Not subject to fence tax. Act 1888, p. 118.

A railway company is not, as to its rights of way, a landowner in the sense in which that term is employed in the Act of March 9, 1888 (Laws, p. 118), whereby boards of supervisors are authorized to levy a special tax on all landowners of any stock law district established thereunder.

FROM the circuit court of Monroe county.

HON. NEWNAN CAYCE, Judge.

This was a suit brought by the state revenue agent against the railroad company, before a justice of the peace, for \$58.25, amount alleged to be due and unpaid on a special stock law tax of one mill, levied by the board of supervisors of Monroe county for the purpose of maintaining the fences inclosing the fifth supervisor's district of said county, which had been declared a stock law district. The claim was made under sec. 2 of the act of March 9, 1888 (Laws, p. 118), in which it is provided that "the board of supervisors shall levy a special tax on all landowners of the district or districts to be inclosed or protected sufficient to pay all the expenses of inclosing or fencing the same," and sec. 3 of said act, in which it is provided "that on each subsequent year the board of supervisors shall levy a special tax sufficient to make all necessary repairs on said fence; *provided*, that no one except the landowners

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within the inclosed district or districts shall pay any part of the levy so made." In the account filed by the plaintiff he based the demand on defendant's ownership of something over six miles of railway track lying in the special stock law district in question, assessed at \$8,500 per mile.

On defendant's appeal to the circuit court from an adverse judgment, there was a trial *de novo* on the merits, at which the following facts were agreed on in open court: That the defendant's railway, right of way and track extended through the stock law district, and was the only property of defendant situated therein; that the defendant was assessed by the state railroad commission for the year 1895—being the year for which the tax was claimed—at \$8,500 per mile; that the special tax of one mill was duly levied by the board of supervisors for the purpose of repairing the stock law fence; that defendant, if liable at all, would be liable for the amount claimed, and had not paid the same; and that the deeds conveying to defendant a right of way through said district were in the form of fee simple conveyances. On these facts plaintiff rested, and defendant moved to exclude them as evidence, on the ground that the defendant was not a landowner within the meaning of the statute, and, therefore, not liable for the tax.

The court sustained the motion and gave judgment for defendant, and plaintiff's motion for a new trial having been overruled, he prosecuted this appeal.

Gilleglen & Leftwich, for the appellant.

1. The defendant by its charter, was authorized to acquire in fee simple the land over which its track was built. Acts 1886, p. 191. The habendum clause in the deeds under which it held its right of way through this stock law district shows a fee simple title.

2. But if it only had an easement, it was still a landowner. 12 Am. & Eng. Enc. L., p. 655, note and cases; *Johnson v. Richardson*, 33 Miss., 464.

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3. The act of March 9, 1888, was not repealed by the code of 1892, because it was a local act and within the saving clause of § 2064 of that code. 13 Am. & Eng. Enc. L., p. 980; *Jones v. Melchior*, 71 Miss., 115; *State v. Ellett*, 21 Am. St. Rep., pp. 788 and 789, and note.

Wallace Pratt and *J. W. Buchanan*, for the appellee.

We submit that neither under the act of 1888, nor under the code, is the right of way and tracks of a railroad such landed property as was contemplated to be taxed for the purpose of building fences or maintaining the same, nor is the railroad company such a landowner as was contemplated under the several acts or the code. The code, § 2062, the last expression of the legislative will on this subject, clearly marks out and defines the character of the lands liable to be taxed for these purposes. It provided for a levy and collection of taxes on specific lands, "whose owners, by reason of the advantages accruing to them or their tenants or employes, are deemed the proper persons to bear the burden; but no advantage shall be considered except that of depasturing stock." There certainly could be no advantage accruing to the railroad company, or its tenants or employes, to say nothing of the fact that a railroad company has no tenants or employes or live stock, such as was referred to in this section. The closing paragraph of the section clearly defines the character of property to be taxed, and that is only those lands whose owners would be benefited by depasturing stock. The railroad company is not in the farming business, nor can it be inferred that it has stock to be depastured. Counsel for appellant, to break the force of § 2062, code of 1892, resorts to the proposition that the act of 1888, chapter 91, was a local law, and was not repealed by the code of 1892. Even admit, for the sake of argument, that this chapter 91, acts of 1888, was not repealed, which we do not concede, still we insist that the railroad company, under acts of 1888, was not such a landowner whose property was liable for a levy for

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this special tax for the purpose of building and maintaining these inclosures.

WHITFIELD, J., delivered the opinion of the court.

The railroad, on the facts in this case, was not a landowner, in the sense of these words in the act of 1888 (Laws 1888, p. 119), and was, hence, not liable for the stock law tax. It was not engaged in farming or raising stock. The scheme for railroad taxation deals with that part of railroads constituting the right of way, whether owned in fee, or held as an easement only, as an agency for transportation, etc.—a common carrier—and is wholly different from the method of taxation applied to the ordinary landowner. No question arises here as to taxation of detached lands, the six and a half miles of right of way only being within the stock law district.

Affirmed.

W. B. ROBERDS *v.* MOBILE & OHIO RAILROAD CO.

1. RAILROADS. *Live stock on track. Stock law district. Code 1892, § 1808.*

Though live stock may, in a stock law district, be wrongfully at large and trespassing on a railroad track, yet, under § 1808, code 1892, the railroad company is *prima facie* liable to the owner for injury to an animal inflicted by the running of its locomotives or cars.

2. SAME. *Peremptory instruction.*

Where an animal is killed or injured by the running of railroad locomotives or cars, even if the animal were unlawfully at large and trespassing on the track, yet a peremptory instruction for defendant should not be given if there be evidence showing, or tending to show, that the injury might have been avoided by the exercise of reasonable care after the animal was seen by defendant's servants in charge of the train.

FROM the circuit court of Monroe county.

HON. NEWNAN CAYCE, Judge.

Brief for appellant.

Roberds, the appellant, sued the Mobile & Ohio Railroad Company before a justice of the peace for the value of a mule which had been killed by a locomotive of the company in a stock law district, a portion of the county in which it was unlawful to allow live stock to roam at large, and recovered in the justice's court a judgment for one hundred dollars; the defendant appealed to the circuit court, where a trial *de novo* was had before a jury. Under a peremptory instruction from the court, the verdict was for defendant, and plaintiff appealed from the judgment entered thereon. The state of the evidence, as adjudicated by the court, will be seen from the opinion.

George C. Paine, for appellant.

We submit that the fact that the killing of the mule occurred in the stock law district of the county, under the facts in the case, will not require the appellant to show that the killing was the result of gross or wanton or cruel negligence on the part of the appellee. Especially is this so under the testimony of the appellant, when he shows that the mule was not running at large by his consent or knowledge, but that it had effected its escape from his lot while he was from home. See 3 Ohio St. Rep., p. 172; 8 Am. & Eng. R. R. Cas., p. 314; 38 Am. Rep., 67; 5 Cal., 513; 62 Conn., 503. Before the appellee can invoke this doctrine, it must appear that the appellant turned his mule out in violation of the statute, and even then the appellee will not be relieved unless the act of the appellant was the proximate cause of the killing. 42 Am. & Eng. R. R. Cas., 555; 71 Ala., 545; 85 Ill., 379.

The case in 71 Alabama is a fine case and is directly in point, as the statute there and the one here are almost the same. We ask the special attention of the court to this case. The appellee has only such rights as the landlord has under the law; he must do no unnecessary hurt to the trespassing animal. See 66 Am. Dec., 552; 71 Ala., 545. It is decided in 4 Ohio St. Rep., 474, that when there is negligence on the part of the

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owner in turning out his stock contrary to the law, and negligence on the part of the trainmen in killing the stock, the latter is said to be the proximate cause, and the former the remote cause, and hence, the owner can recover. Although the owner knowingly permits his stock to run at large contrary to the law, he may recover for the killing, whether it was due to gross or wanton negligence, or consisted merely of want of ordinary or reasonable care. See 95 Mo., 232; 45 Mo. App., 123; 19 Ga., 437; 20 Am. & Eng. R. R. Cas., 481.

Under the testimony in this case, we earnestly submit that the trial judge committed error in not permitting the case to go to the jury.

Sykes & Bristow, for appellee.

It being admitted that the mule sued for was killed running at large unlawfully in a "stock law" district of Monroe county, the plaintiff was guilty of contributory negligence, and cannot recover for the killing. At any rate, the defendant railroad company is not held to as high a degree of diligence as in other sections; and it devolves on the plaintiff to prove wanton or wilful or gross misconduct on the part of the defendant, or such a degree of negligence as would amount to wantonness or wilfulness. By the provisions of the act of the legislature of Mississippi, of March 9, 1882 (Laws of 1882, p. 237), it is made unlawful for live stock to run at large in the district in Monroe county where the mule was killed; and the owner of such live stock is made liable for all injuries and trespasses committed on all crops and lands in the district, the claim for which is made a prior lien on the trespassing stock.

The question then recurs, does the unlawful act of the owner of stock, in allowing them to run at large on and about the railroad track, in violation of an express prohibition, constitute contributory negligence on his part, so as to defeat his recovery of damages for injury to said stock while so unlawfully upon the track? And while we must admit that there are a few

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authorities to the contrary, yet we submit that reason and the overwhelming weight of authority in the United States, and the unanimous concurrence of the courts in England, sustain the doctrine contended for by us, that such an unlawful act is contributory negligence. All these authorities hold that "in those states of the union in which the common law rule requiring the owner of domestic animals to keep them from straying, at his peril, is recognized," and *a fortiori* where it is forbidden by statute, "it is generally the rule, where there is no statute prescribing a different liability, that a railroad company is not liable for injury to such animals straying upon its track." 7 Am. & Eng. Enc. L., 922, and cases cited in note 2.

In the states of Maine, New Hampshire, Maryland and Pennsylvania, it is broadly held that even for a wanton injury to stock unlawfully straying on the track, the railroad company is not liable. *Railroad Co. v. Skinner*, 19 Penn. St., 298; *Railroad Co. v. Lamborn*, 12 Md., 257; *Perkins v. Eastern Railroad Co.*, 29 Maine, 307; *Railroad Co. v. Rehman*, 49 Penn. St., 101; *Woolson v. Railroad Co.*, 19 N. H., 267.

And in *Clark v. Railroad Company*, 11 Barbour, 112, it is held that there can be no recovery against a railroad company for any injury to animals by gross negligence, in case where the cattle injured were straying upon the track. The principle which defeats a recovery in such case is that the owner of the cattle permitting them to be at large, unlawfully, upon the track, is thereby guilty of contributory negligence, and it is therefore negligence against negligence; and the courts will not weigh the precise degrees of the negligence on both sides. But in several cases in Mississippi the appellate court has held, by the plainest and absolutely unavoidable implication, that where the running at large of stock is made unlawful by local or general laws, such straying constitutes contributory negligence on the part of the owner.

In *Railroad Company v. Field*, 46 Miss., 578, Judge Simrall says: "The common law principle which required the owner

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to confine his stock on his own premises, and made him a wrongdoer if they escaped into the lands of his neighbor, never obtained in this state," and held further, that uninclosed lands, although private property, are *quasi* common, or, as expressed in local parlance, a "range," in which the owners of domestic animals generally may permit them to go at large and depasture without thereby incurring any responsibility as trespassers. And it was for this reason alone that the court held the railroad company liable for injury to the cattle so straying upon its track. And even in such a state of the law the court still held that "if the convenience and business of the public demand a rapid transportation, railroads are not restrained from meeting the requirements of commerce because the danger to stock is greater from a fast than a slow train."

This, it must be remembered, is under the law as it was then, holding the owner of cattle straying on a railroad track not a trespasser in anywise.

And in *Railroad Co. v. Jones*, 59 Miss., 470, Judge Chalmers says: "We see no elements of contributory negligence in the case. The owner of cattle or horses has the right, even in an incorporated town, to depasture them upon the common, in the absence of any local legislation prohibiting it, and is not guilty of negligence in so doing. The risk which he thereby assumes is greatly increased, but such a practice, though dangerous and reprehensible, is not unlawful, nor does it diminish his right to demand compensation from those by whose fault damage is inflicted." Here, again, the court will perceive that the decision making the defendant railroad liable is squarely based upon the absence of the common law rule and of any statutory prohibition as to stock running at large.

And so in *Railroad Co. v. Patton*, 31 Miss., 156, the court held that in this state the owner of cattle may lawfully permit them to range at large on uninclosed commons, and if in so doing they wander onto the premises of another, the owner of the cattle is not liable for the trespass, and the cattle cannot be

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distraigned damage feasant. And Judge Handy, on pages 186 to 187 of the case, based his decision of the liability of the railroad company and of the insufficiency of the defense of contributory negligence (set up on account of the cattle running at large), on the absence in this state, from the date of its organization, of anything like the old common law rule requiring cattle to be kept up by the owners, and, also, partly on the existence here of certain statutes virtually allowing such cattle to run at large.

Now, we repeat that, in all these Mississippi cases, the railroad companies were held liable, and their defenses of contributory negligence from the cattle being allowed to run at large on uninclosed lands, untenable, alone because of the absence of anything like the common law rule, or of any statute of the state, making it unlawful for live stock to stray upon the lands of another, and constituting such straying a trespass.

And whatever may have been the object or the occasion of the act of 1882 (and we submit it does not make a straw's difference what it was passed for), it does undoubtedly in so many words make it an unlawful act for any live stock to run at large in that part of Monroe county in which the mule was killed.

But, granting that the unlawful allowing of cattle to run at large in this stock law district does not *per se* constitute contributory negligence, yet we submit that such unlawful act is by no means uninfluential in the decision of suits for damages for the killing or injury of animals by railroad companies, and that in such cases neither the plaintiff nor the defendant stands in the same position as if the stock were not trespassing at the time of the injury, but were of legal right on the railroad track.

In the states of New York, Indiana, New Jersey, Pennsylvania, Minnesota, Massachusetts, Maryland and Vermont the courts have held that even the mere act (even though not prohibited by law), of allowing stock to trespass upon the lands

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of another, constitutes contributory negligence on the part of the plaintiff except in cases of gross or wilful misconduct. And the extreme length to which a great majority of the courts have gone is that the act of the owner of live stock in allowing them to run at large and trespass upon others' lands will not exempt the railroad company from the obligation to use reasonable care to avoid injury to such live stock. See 7 Am. & Eng. Enc. L., p. 923, and cases in note.

What are the facts in the case at bar? Not only has the plaintiff failed, as we think, to show any gross, wilful or wanton negligence on the part of the defendant, but we submit the record shows that there was no lack of any reasonable care or diligence on the part of the defendant; we might go further, and say that there was shown affirmatively the exercise of the very highest degree of diligence on the part of the defendant, and that this suit would never have been dreamed of but for the well-known proclivity of juries to find against railroad companies, utterly regardless of law or evidence.

STOCKDALE, J., delivered the opinion of the court.

It is assigned as error in this cause that the court below gave a peremptory instruction to the jury to find for defendant. Counsel for appellee, to sustain that action, present three propositions: (1) The mule was killed in the stock law district of Monroe county, while running at large, and hence a trespasser; and the owner is barred of recovery by contributory negligence. (2) Gross and wilful negligence is not shown. (3) Appellee is not liable, under the proof, in any event. Many authorities are cited to show that before the passage of the stock law, where the court held railroad companies liable for killing stock, stress was laid on the fact that stock was rightfully allowed to run at large, and were not trespassers when on the track. Admitting that the mule was trespassing by being at large, that does not absolve a railroad company from the obligation to exercise reasonable care to avoid injury to it when it is seen by

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the servants of the company. It was held by this court in *Railroad Co. v. Phillips*, 64 Miss., 693, that the railroad company was *prima facie* liable for injuries to Joseph Brantley, inflicted by the running of its cars, whether he was rightfully on the train or not, and that for an injury so inflicted, § 1059, code 1880, was applicable; that a precedent wrong would not excuse the injury. In this case it is admitted that appellee killed the mule by the running of its locomotive and cars, and therefore § 1808, code 1892, makes it *prima facie* liable for the injury, notwithstanding a precedent wrong. To remove that *prima facie* liability, defendant, in the court below, introduced witnesses, and plaintiffs below introduced witnesses to sustain the liability. There was, in that trial, evidence tending to show that the injury might have been avoided by the exercise of reasonable care after the animal was seen by the servants of the company; and there were such contradictory statements made by witnesses, and important conflict in the testimony, as required the case, as we think, to be submitted to the jury for its consideration and finding. We think, therefore, that the court erred in granting the peremptory instruction asked by defendant.

The judgment of the court below is reversed, and the cause remanded.

R. G. HUDSON, SURVIVOR, v. T. A. KIMBROUGH, ADMR.

1. ATTORNEY AND CLIENT. *Statute of limitations.*

An attorney at law is liable for any breach of duty under his contract of employment; and, such liability attaching immediately upon the breach, the statute of limitations ordinarily begins to run from the breach.

2. SAME. *Trust.*

While the relationship of attorney and client, where the employment extends only to the collection of a single claim, is, in a limited sense, one of trust, yet it is not such an express and continuing

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trust as will take the client's cause of action out of the operation of the statute of limitations.

3. SAME. *Concealed fraud.* Code 1880, § 2679.

The client's action against his attorney for breach of contract of employment, must, in case of fraudulent concealment of the cause of action, be begun, as provided by § 2679, code 1880, within the prescribed period after the discovery of the cause of action, or from the time when reasonable diligence would have led to its discovery.

FROM the chancery court of Sunflower county.

HON. W. R. TRIGG, Chancellor.

The co-partnership, of which appellant is the survivor, employed appellee's intestate, who was an attorney at law, to collect a debt due the firm from third parties. The other facts are sufficiently stated in the opinion of the court.

W. S. Chapman and *T. J. Manion*, for appellant.

Complainants need not allege they used reasonable diligence, etc., because the parties sustained the relation of client and attorney. On demurrer, complainant need not allege he brought suit within three years from the time the fraud was first discovered, because the fraud is admitted, which gives the court jurisdiction.

Bigelow, in his excellent work on fraud, makes the statement that a client who sues an attorney for money collected, and alleges concealed fraud, etc., is not required to allege that he brought his suit within the statutory period from the time of the knowledge of the fraud, but that it is on defendant to make this affirmative defense.

Calhoon & Green, on same side.

An attorney, whose duty, arising out of the confidential relation, was to pay over money promptly upon its collection, and who, two months after its collection, wrote that he had not collected it, and two years after collecting it informed his client that he had not collected anything, but would collect and remit

Brief for appellees.

on his return home, should not be allowed to keep the client's money behind the defense of the statute of limitations, unless he shows that he had removed the deceptions practiced, and that his client at some time had been undeceived by him. There is no pretense that the attorney ever accounted; on the contrary, it is averred that he fraudulently concealed the collection. So "there was nothing that the greatest diligence could take hold of to lead to a knowledge of" the collection. *Edwards v. Gibbs*, 39 Miss., 173.

"It is a general rule in equity that the statute of limitations only begins to run, in cases of fraud, from the time of the discovery of the fraud, but the party complaining of the fraud, and seeking to avoid the statute on that account, must show that he used due diligence to detect it, and if he have the means of discovery in his power, it will be equivalent to a knowledge of the fraud." In order to excuse the use of proper diligence, it is well settled, upon reason and authority, that there must exist some relation of trust and confidence—as, principal and agent, client and attorney, *cestui que trust* and trustee—between the party committing the fraud and the party who is affected by it, which rendered it the duty of the former to disclose to the latter the true state of the transaction, and showing that it was through confidence in the acts of the party who committed the fraud that the other was prevented from discovering it.

. . . It has long been the settled rule in England that where a party has been kept in ignorance of his rights by the fraud of the person sought to be charged, the statute shall not begin to run until after the fraud has been discovered. *Buckner v. Calcote*, 28 Miss., 434, 597; *Livermore v. Johnson*, 27 Miss., 284.

Mayer & Harris, for appellees.

This action is based on open account. The petition shows affirmatively that the attorney converted the petitioner's money to his own use on April 21, 1883. The three years' statute,

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therefore, would ordinarily have barred this debt on April 21, 1886, which was five years before the bill in this case was filed, and also five years before the debt herein set up was probated. But it is claimed that this was a case of concealed fraud, and, therefore, that the three years' statute of limitations, because of the operation of § 2679 of the code of 1880, did not run from the date of the conversion. Suppose that be admitted? The provision of the statute is that the three years' statute shall begin to run from the time at which the fraud shall be discovered, or from the time at which, with reasonable diligence, it might have been first known or discovered. Now, our contention is that petitioner did not exercise reasonable diligence; that if he had exercised such reasonable diligence, he might have discovered the payment of this amount at a date long prior to such time as would have been three years before the probate of his demand—that is to say, long prior to the month of March, 1888.

WOODS, J., delivered the opinion of the court.

In a limited and narrow sense, the relation subsisting between the attorney and client, as shown in the case at hand, in which is involved only the collection of a single claim, may be characterized as one of trust, but it is not of the class of express and continuing trusts covered by the principles announced in *Livermore v. Johnson*, 27 Miss., 284; *Buckner v. Colcote*, 28 Miss., 432; and *Edwards v. Gibbs*, 39 Miss., 166, which are cited by and relied upon by the learned counsel for appellant. This relationship of client and attorney is created by contract, and for any breach of duty under such contract the attorney is liable to his client, and such liability begins immediately upon the breach of the contract, and the statute of limitations begins to run from the date of the breach, ordinarily. Of course, if there was fraudulent concealment of this breach by the attorney, under § 2679, code of 1880, the statute would begin to run from the time of the discovery of the fraudulent concealment, or from

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the time when reasonable diligence would have discovered the fraudulent concealment.

Now, what are the facts as they are stated in the bill of appellant? These, namely: That a claim was placed in the hands of the attorney for collection, by appellant, and that, in April, 1883, the attorney collected one hundred dollars on said claim, but fraudulently concealed the fact of such collection from his client, and, in support of this charge of fraudulent concealment, certain allegations of the bill, which are admitted by the demurrer, are relied upon, viz.: (1) That in June, 1883, two months only after the collection of the one hundred dollars had been made, he wrote his client that no collection had been made, though the land had been sold (as the necessary implication from this letter, and a former one, dated March, 1882, both being made exhibits to the bill, sold at execution sale to satisfy the client's judgment obtained on the claim held by the attorney for collection, and for cash), but that the bidder at the sale had not yet paid the purchase price; and (2) that during the session of the legislature of this state, of 1884, which we judicially know began very early in the month of January of that year, the attorney again, in person, informed his client that nothing had been collected, but that when he (the attorney) returned home he would collect the judgment and remit, but, the petition avers, the attorney never did remit, and he did not enter any credit upon the judgment roll of the proper county, in which judgment was rendered, and in which the collection was made.

The further facts are, that the attorney died in March, 1889, without remitting the collection, and without any further communication in reference thereto, and that the claim of appellant, on which this suit is based, was probated against the deceased attorney's estate, on the second day of March, 1891, when the running of the statute of limitation was thereby arrested.

We thus have a period of about seven years and two months from the date of the last false and fraudulent statement made in Jackson in January, 1884, to the date of the probate of the

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claim in March, 1891, without any efforts on the client's part to discover the fraudulent concealment of the collection by the attorney. It goes almost without saying that the client is entitled to a reasonable time within which to move to discover the fraudulent conduct of the attorney; but it goes also equally without saying that the client cannot wait indefinitely, through all the remainder of the attorney's life, and two years afterward, before reasonable diligence will require him to begin to examine and inquire. Here we have in this case a client, for four years and two months after the bar of the statute would, in ordinary cases have been complete, doing absolutely nothing to discover the fraudulent concealment. But the dilatoriness of the client is even worse than that. Knowing that a judgment had been obtained on his claim held by his attorney for collection, he actually did nothing to ascertain what had been done with his judgment for more than seven years after the last act of fraudulent concealment until he probated his claim and suspended the running of the statute. In other words, he did nothing until the very judgment obtained by his attorney on the claim had itself been barred by the statute.

The question we are considering is examined in the very early case of *Stafford v. Richardson*, 15 Wend., 302, and in the later cases of *Dorney v. Gerard*, 24 Pa. St., 52, and *Campbell's Admr. v. Boggs*, 48 Pa. St., 524, and the opinions in these cases were in line with the views we have advanced. The opinion in the last named case is singularly lucid, logical and convincing, leaving little or nothing further to be said. The still later case of *Rhines v. Evans*, 16 P. F. Smith (Pa.), 192, follows *Campbell's Admr. v. Boggs*, and, in the application of the principles of law to the facts of Rhines' case, illuminates our way in the case before us. But there is no room for contention in this state, in view of what was said and held in *Cook et al. v. Rives*, 13 Smed. & M., 328. The conclusion of the court in that case that even fraudulent concealment, by an attorney, of the cause of action would not take a case out of the statute,

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will no longer be followed now, because the exception of fraudulent concealment is engrafted on our present statute of limitations in express terms, and we give effect to the present statute as written. We hold, however, that on the facts disclosed by the transcript before us, reasonable diligence to discover the fraudulent concealment is not shown, and the bar of the statute applies.

Affirmed.

S. A. AGNEW ET AL. v. A. G. JONES.

1. LAND. *License.*

A verbal agreement by the owner to convey land to a county for school purposes, by which third parties are induced to erect a schoolhouse thereon, is an irrevocable license for the purpose for which it was made, as long as the house is used for the purpose specified.

2. SAME. *In whose favor license good. Trespass.*

A license to use land is good only to those in whose favor and for whose use it is given. Every entry upon the land of another without lawful authority is a trespass, whether the land be inclosed or not, and whether appreciable damage be done or not.

3. SAME. *Entry to take one's own personalty.*

It is a trespass to enter the land of another, without his consent, to take one's own personal property.

FROM the circuit court, first district, of Hinds county.

HON. ROBERT POWELL, Judge.

Plaintiffs sued defendant before a justice of the peace, claiming that they were the owners of a house which defendant had torn down and converted the material thereof to his own use. A jury trial was had in the justice's court, resulting in a verdict of one cent against defendant. Plaintiffs appealed to the cir-

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cuit court, where a trial *de novo* was had, and, upon which, the facts were shown to be these:

Certain residents of Forest Hill School District concluded, for their convenience, to erect a schoolhouse at a point near the southern boundary of the district. There was already a schoolhouse belonging to the district, but it was located in the northern part thereof. These residents selected an acre of land belonging to the ancestor of the plaintiffs, who was one of their number, upon which to erect the new house, and plaintiffs' ancestor, consenting thereto, agreed verbally to execute a deed, conveying the land to the county for school purposes, but it was understood that the deed should provide that religious worship might be held on the premises, and if the use of the land for school purposes was abandoned, the title thereto should revert to the grantor, or his heirs; but it was a controversy, on the trial, whether the agreement was that the proposed deed should provide that the house itself was never to be the property of the grantor. The house sued for was built upon the land, under the verbal agreement, partly with money obtained for the purpose from the county, and partly by voluntary contributions from the parties interested. This was done in the lifetime of plaintiffs' ancestor. A school was maintained in the house for a year or two, and then, after the death of plaintiffs' ancestor, the patrons, or a large majority of them, of Forest Hill School District—one of the plaintiffs, as was claimed by defendant, participating—agreed to dispose of both schoolhouses, and with the proceeds erect a new one near the center of the district; the school board of the county having so located the school of the district. The house in controversy was sold accordingly by a committee of the patrons of the school district, and the purchaser from them conveyed the same to the defendant. The members of the committee who made the sale were not of those who built the house. Plaintiffs' ancestor died intestate without ever having executed a deed to the premises, and several of the plaintiffs are infants. Defendant tore down

Brief for appellee.

the house, the value of which was proved, and converted the material to his own use. The trial in the circuit court resulted in a verdict and judgment for defendant. Plaintiffs appealed to the supreme court.

Loncry & Jayne, for appellants.

The well-settled principle of law is that a building permanently fixed on the freehold becomes a part of it; that *prima facie* a house is real estate belonging to the owner of the land upon which it stands. The exception to this rule obtains only when a building is erected upon the land of another, for a special purpose, by written or parol agreement between the parties that the builder has the right to remove the building at pleasure. Tested by this rule, the judgment should be reversed, as the evidence unmistakably fixed the house permanently on the acre of land referred to, and prescribed its use in case it was abandoned as a school.

The duties and powers of school trustees are limited (see § 4005, code of 1892), and our statutory laws neglected to clothe patrons and citizens of a school district with authority to sell property belonging to other people. The law and evidence unmistakably fix the legal rights of the parties, and the court below should have given the peremptory instruction asked by appellants.

Williamson & Potter, for the appellee.

If the house was put on Agnew's land with the agreement and understanding that he would deed the land to the county or to the trustees of the school, he nor his heirs can refuse or fail to make the deed and hold the house. The people who put the house on the land under such circumstances had a right to tear it away without the consent of Agnew or his heirs.

After inducing the people to use the county money and their own to build the house on his land by promising to make deed and agreeing the house should never become his own for any

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purpose, Agnew, the ancestor, if he were living, could not object to removal of the house after he refused or failed to make the deed; and if he had made the deed, according to the understanding, the people of the district had the right to remove the house and abandon the use of the acre of land. The plaintiffs have no greater rights than their ancestor would have, if living. Inheriting from him, they are parties to, and bound by agreements and contracts made by him relative thereto.

Jones was not a trespasser in going upon the acre of land where stood the house he had bought and paid for. The people and patrons of that school district had a right to go on that acre of land and to make or do what they pleased with the house, under the very agreement made with Agnew at the time it was put there. Agnew consented and agreed that the community should own the house and might go on this acre of land while the house stood there. The community chose to dispose of the house, and authorized Jones to go there and take the house away.

Argued orally by *Robert Lowry*, for the appellant, and by *C. M. Williamson*, for the appellee.

STOCKDALE, J., delivered the opinion of the court.

A. M. Agnew's agreement that he would make a deed to Hinds county to the acre of land on which the house was to be erected, was an irrevocable license for the purposes for which it was made, as long as the house was used for the purposes specified. The heirs of Agnew have all the rights, and no more, that their ancestor had.

The license, had the deed been made or not made, deprived the grantor of the possession and use of his land, only so far as was stipulated in the agreement or the deed, and only to those in whose favor and for whose use the license was given, and he is the owner and possessor against the balance of the world. One owning land over which others have the right of way, has

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such property in the right of way as will support trespass. Am. & Eng. Enc. L., vol. 26, and cases there cited, p. 592.

If Mr. Agnew granted the license to build and use a school-house, the land to revert to him when the school was abandoned, then the license ended in September, 1894, and his heirs were the absolute owners in January, 1895, when appellee tore down the house. If the license was for the erection of a school-house, and when the school failed it was to stand there as a house of worship, no one had the right to sell or remove it while so used; and probably it still exists, for the same people have rebuilt a house, as the record shows.

If the land reverted when the school ceased, and the title of the house did not go with it, it must have remained in somebody, and by what legal process it got into the respectable gentlemen who met at Forest Hill seems to be a problem. The county had made no transfer, nor had Kelly, Hawkins or Agnew. If the gentlemen who met at Forest Hill had no title, Jones, the appellee, acquired none. They were all utter strangers to the whole transaction of building that house, and a meeting of school patrons in any corner of the county would have had the same right. Not one of them had contributed a cent to build it, nor did they patronize the school held there. Even if they had a title to the house, appellee could not enter without consent, except by process of law, and the minors did not consent. None but that community had a right to enter that house for any purpose, and that community only for the purposes of schools and worship. Agnew himself could not enter for any purpose but as above. No one would contend that the people of that community even could have held political meetings or lodge meetings in that house, nor on that acre of land, without Agnew's consent, because his grant did not include such purposes, and he still owned what he had not granted. It would seem that it was his duty to preserve that property inviolate for its proper uses, having induced the people to build

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there, and particularly against people who would destroy it utterly—the grant was not for that purpose.

What is a trespass? Every entry upon the land of another, without lawful authority, is a trespass, though it only be trodden, and whether the land be inclosed or not, and no matter whether any damage be done or not. The gist of the action is the wrongful entry; whatever is done after that is but aggravation of damages. If a man's land be not inclosed, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close. The mere act of breaking through this imaginary boundary constitutes a cause of action, as being a violation of the right of property. *Waterman on Trespass*, vol. 2, pp. 219, 220, sec. 810, citing many cases; *Am. & Eng. Enc. L.*, vol. 26, p. 592.

While Agnew had no right to the house to occupy it for private use, he certainly had an interest in it as one of the builders and one of the community—to have it remain there as a schoolhouse and as a house of worship, and to have it remain in that place on his land, and his heirs were damaged by its removal.

It would be a dangerous doctrine to establish in this country, that those who deem themselves owners of any property situated on another's premises may enter without leave and take it without invoking the process of the law. Buildings are presumed to be part of the realty until the contrary is shown, and that must be done in the courts.

A squatter on public lands cannot remove his buildings, however temporary, without the consent of the man who entered the land from the government. *Welborn v. Spears*, 32 Miss., 138. It is a trespass to enter the land of another, without his consent, to take one's own personal property. *Heerman v. Vernon*, 6 Johns., 5; *Blake v. Jerome*, 14 Johns., 406; *Newkirk v. Sabler*, 9 Barb., 652. In view of these principles, it was error in the court below to give instructions two and four. The latter instruction, four, is in these words: "If the jury believe from

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the evidence that Mr. Agnew, the ancestor, agreed to make a deed to the acre of land on which the house was located, and it was agreed and understood that the house should never be the property of Mr. Agnew if put on the land, but should be for school purposes, or other public purposes, they must find for defendant." This instructs the jury that if a deed was agreed to be made by Agnew, without saying to whom or what sort of deed, and that Agnew was not to own the house, but it should be for school purposes, or other public purposes no matter what, then appellant had the right to enter and tear it down and take it away. The scope of this instruction is to license any man to enter any other man's land and tear down and carry away any house that the party in possession does not own. This instruction is not cured nor assisted by number two; it is subject to the same objection to a less extent.

The judgment of the court below is reversed and the cause remanded.

WOODS, C. J., concurs. WHITFIELD, J., dubitatur.

S. S. SNIDER v. UDELL WOODENWARE Co. ET AL.

1. HUSBAND AND WIFE. *Conveyances between. Acknowledgment. Notice.* Code 1892, § 2294.

Under § 2294, code 1892, providing that conveyances between husband and wife shall be invalid as against third persons, unless acknowledged and recorded, an unacknowledged deed from a husband to his wife is invalid as against the attaching creditors of the husband, although recorded, and such creditors, prior to attaching, had actual notice of the conveyance and of its contents as they appeared of record. Citing *Montgomery v. Scott*, 61 Miss., 409.

2. EQUITY. *Illegal act. Demand connected therewith.*

The test whether a demand connected with an illegal act can be enforced, is whether the plaintiff requires any aid from the illegal transaction to establish his case. Citing *Gilliam v. Brown*, 43 Miss., 641.

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3. SAME. *Case.*

A tenant in common who in the prosecution of a scheme to acquire the interests of her co-tenants causes her husband to buy the land for her sole benefit at tax sale, the conveyance being made to the husband, cannot, as against his attaching creditors, maintain a bill to enforce a resulting trust in the land on the ground that her money was used in the purchase.

FROM the chancery court of Madison county.

HON. H. C. CONN, Chancellor.

It appears, from the averments of the bill of complaint filed by the appellant, that, in 1870, she and her two younger sisters owned the land in controversy as tenants in common and heirs of their deceased father, who died in possession during that year; that she married the defendant, L. Snider, during that year, and her sisters fell to her care; that shortly after the death of her father, on account of some complication concerning the title, she was advised by her attorney then employed by her, to let the land be sold for taxes, and buy it in her own name and hold it for her own benefit; that the land was sold for taxes in 1877, and her husband bought it for her with her money, but, by some inadvertence, the collector's conveyance was made to her husband; that she received the rents and profits, and did not know, until a few months prior to the filing of her bill, that the tax deed was made to her husband, when, on April 18, 1896, to remedy the error, he conveyed the property to her, the consideration expressed in his deed being \$720; that her husband had become insolvent, and that it was agreed between them that she would take this deed in payment of a debt of several thousand dollars that he owed her, and for which she had no security; that this deed was not acknowledged, but was recorded without her husband's acknowledgment, and that, afterwards, on July 2, 1896, it was acknowledged by her husband and again recorded; that in the interval between the first and second recording of the instrument, the appellees, creditors of her husband, attached the land on the ground of her hus-

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band's nonresidence, and that when said attachment was sued out, the appellees had notice of her title through their attorney, who had read the unacknowledged deed on the record of deeds of the county.

The bill made the husband of appellant and appellees' attorney parties defendant as well as the appellees, and prayed for an injunction, the dismissal of the attachment suit, and general relief.

Appellees demurred to the bill, assigning as grounds of demurrer the matters discussed in the opinion of the court. From a decree sustaining the demurrer and dismissing the bill, this appeal was prosecuted.

F. B. Pratt, for the appellant.

The bill clearly shows a resulting trust in the appellant. The wrong to her co-tenants, if any, was a matter that in no way concerned the appellees, and could not be availed of by them to defeat her remedy. 1 Pom. Eq. Juris., sec. 399; 15 Am. Dec., 756; 46 *Ib.*, 650.

W. H. Powell, for the appellees.

The deed to appellant was one made by her husband, and was invalid as to appellees, creditors of her husband, for want of acknowledgment, at the time their lien was fixed by attachment. Code 1892, § 2294. The illegal recording of a deed affords no notice. *Montgomery v. Scott*, 61 Miss., 409. The complainant, by her fraud in procuring the tax sale to her husband, is estopped to claim any right thereunder.

COOPER, C. J., delivered the opinion of the court.

The demurrer to the bill was properly sustained. The conveyance from Snider to his wife was not acknowledged, and was therefore not entitled to registration. If the defendant or its attorney saw the copy of the conveyance spread upon the record, and read it, or if actual knowledge of the fact that the

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conveyance had been made could be proved, no force would be given to the deed. It is not a question of notice, but of the validity of the transfer of the estate from the husband to the wife. The statute governing conveyances from husband to wife declares that they shall not be valid as against third persons unless in writing, acknowledged and recorded; and emphasis is given to this requirement by the declaration that change of possession shall not avail, but, "to affect third persons, the writing must be filed for record." Code, § 2294; *Montgomery v. Scott*, 61 Miss., 409.

The effort of complainant to disregard the conveyance, and fix upon the land a resulting trust, because her money was paid for the same at the tax sale under which her husband bought, must fail, for the reason that she shows by her own statement that the land, when sold for taxes, belonged to her, and to her two younger brothers or sisters, who were under her care, and that the sale for taxes was permitted by her to be made in order that she might "buy the same in in her own name, and for her own benefit." She cannot invoke the aid of a court of equity to enforce the contract made between her husband and herself in execution of this fraudulent scheme. She can obtain relief only by securing execution of that scheme, and to this a court will not lend its aid. The test whether a demand connected with an illegal act can be enforced is whether the plaintiff requires any aid from the illegal transaction to establish his case. *Gilliam v. Brown*, 43 Miss., 641.

The decree is affirmed.

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ISIDOR GROSS v. JOHN OATIS ET AL.

1. DEED OF TRUST. *Assignment. Bona fide holder.*

If the holder of a deed of trust indorses the same, and the note secured by it, and permits the possession of the instruments to pass, and the indorsee transfers the same for value to an innocent third party, the latter will acquire title thereto superior to any undisclosed equity in the original indorser.

2. SAME. *Junior incumbrancer.*

The owner of a prior deed of trust on personal property to secure a sum greater than the value of the property, may acquire the property from the grantor in his deed freed from a junior lien on the same property.

3. SAME. *Innocent purchaser. Extent of right.*

If a purchaser be a *bona fide* one for value, he is entitled not alone to be saved harmless to the extent of his money paid, but should be protected in the fruits of his bargain.

FROM the chancery court of Madison county.

HON. H. C. CONN, Chancellor.

Woodman & Bro. were indebted by note to appellant, Gross, in the sum of \$1,459.75, and, in January, 1894, executed a deed of trust upon a number of cattle to secure the same. In January, 1895, after the maturity of said note, appellee, Oatis, having acquired an interest in the farm upon which Woodman & Bro. had carried on business, and in the cattle, applied to Gross for credit, and to arrange concerning the cattle upon which the latter held the deed of trust. It was agreed between them that credit would be extended, and that Gross would assign his claim on the cattle upon the payment to him by Oatis of \$900, the payment to be made November 1, 1895. Thereupon Oatis executed a deed of trust upon certain personal prop-

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erty, including the cattle, to secure Gross for the credit to be extended and said \$900, it being understood that the Woodman & Bro. deed of trust should remain in force, and would be transferred, together with the note secured by it, to Oatis, upon the payment of the \$900 and the sum to be advanced him. Gross then and there formally indorsed to Oatis the deed in trust and note given by Woodman & Bro., but whether there was ever a delivery was one of the disputed questions of fact in the case. Gross insisted that the instruments were not to be delivered until he was paid by Oatis; that the possession of the papers, which admittedly passed, were obtained from him fraudulently, and that he had never been paid in full. Oatis contended that he had fully complied with the terms upon which the writings were to be delivered, and that they were actually delivered to him, and were so delivered with the understanding and agreement that he might sell the cattle or assign the note and deed of trust in order to raise money.

Being in possession of the note and deed in trust, Oatis assigned the same to Mrs. Johnson for three hundred dollars cash, and Mrs. Johnson afterwards gave Woodman & Bro. ten dollars for a bill of sale, conveying their interest in the cattle to her, and she took possession and disposed of them, her husband acting for her in making the deals. The bill was filed by appellant, Gross, to enforce the deeds in trust for the balance, which he claimed to be due him from Oatis. The defendants were the makers of the deeds, Mrs. Johnson, her husband and one J. W. Johnson, a partner of the husband, who had participated in the conversion of the property. The court below decreed that Oatis owed Gross a sum exceeding five hundred dollars; that the cattle were worth four hundred and sixty dollars; that the Johnsons were innocent purchasers to the extent of three hundred and ten dollars, the cash actually paid by them, and rendered a personal decree in complainants' favor for one hundred and fifty dollars, against Oatis, Mrs. Johnson, her husband and J. W. Johnson. Complainant appealed, and the parties

Brief for appellees.

against whom the personal decree was rendered prosecuted a cross appeal. 1

F. B. Pratt, for the appellant.

It is manifest that neither Oatis nor Woodman could successfully resist the claim of Gross on the cattle, being estopped by their conduct, etc. Can they convey any greater right to Johnson than they themselves possessed? By the acts of Woodman and Oatis, title to the cattle became vested by estoppel in Gross or at least in Gross's trustee in the deed of trust. The title of Woodman was divested. Can Woodman, having no title as against Gross, convey to Johnson any title? Is Johnson an innocent party? Is he a purchaser for value without notice? His own testimony, in connection with the testimony of his co-defendant, Oatis, and the testimony of wholly disinterested and uncontradicted witnesses shows that if he ever paid Oatis any money at all, he paid it after he had full notice of the claims of Gross. And even though this was not fully established, yet the circumstances under which he bought were so suspicious that any man would thereby be put upon inquiry.

H. B. Greaves, for appellees.

Estoppel by conduct arises from an act or declaration of a person interested, calculated to mislead another, on which that other has relied and has so acted, or refrained from acting, that injury will befall him if the truth of the act or declaration be denied (*Staton v. Bryant*, 55 Miss., 261); and where one actually misleads another, although innocently, the maxim is justly applied to him, "that where one of two innocent persons must suffer, he shall suffer, who, by his own acts, occasioned the confidence and loss" (1 Story Eq. Juris., pp. 367 and 387); and "where one puts the evidence of his lien into the debtor's hands, so as to enable him to represent it as extinguished, and thereby gain further credit upon the mortgage of the same property, the first lien will be postponed to the subsequent

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one" (1 Story Eq. Juris., sec. 390a, p. 382; Kerr on Frauds and Mistakes, pp. 138, 139, 140).

Where one of two innocent persons must suffer by the fraud of a third, he must suffer who put it in the power of such third person to defraud—as, where one permits another to hold himself out as the owner of property (7 Am. & Eng. Enc. L., p. 18, and see note 2, citing 94 N. W., 64; 55 N. Y., 41; 33 Ohio St., 178); and “a man who permits himself to be made a tool of by another, in whose hands he had left the deed, cannot set up, as against a third party, who acted fairly and honestly in the transaction, that he had been deceived” (Bump’s Kerr on Frauds and Mistakes, pp. 138, 139).

I hold, and it seems to me founded on reason and common sense, that one buying a deed of trust which is an existing lien on personal (or real) property, is not required to go beyond his deed. I fully recognize the doctrine that one must take notice of everything appearing on the face of his title deed, and through which he claims; but can it be said with any show of sound reasoning, that a person buying a deed of trust, knowing same to be alive, who has examined the records to the date of the deed of trust, and knowing as a proposition of law no after conveyance can affect its lien, is required to examine indefinitely as to after conveyances, which, according to all principles of law, are postponed to such instrument?

Is Johnson a *bona fide* purchaser? Was he aiding and abetting Oatis in his fraudulent design? Both of these questions, as a matter of fact, the court below determined favorably to defendants in this cause, and the findings are abundantly supported by the evidence.

Argued orally by *F. B. Pratt*, for appellant, and by *H. B. Greaves*, for appellees.

WOODS, J., delivered the opinion of the court.

If the evidence offered to support the view of Oatis, as to the understanding and agreement of Gross and himself, in the mak-

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ing of the transfer to him by Gross of the note of Woodman & Bro., and the trust deed given to secure its payment, be correct, the bill of complaint exhibited herein by Gross is without any merit, and should have been dismissed outright. And if the theory of Oatis' answer is shown to be false, and the evidence offered to maintain it appears unworthy of credence, still the bill should have been dismissed, unless there was shown bad faith on the part of the Johnsons in the transaction, whereby they became holders of the paper above referred to.

The evidence discloses that on the same day in which Oatis executed his note and trust deed in favor of Gross, and on which Gross bases his claim in this suit, the latter transferred by indorsement, in writing, both the note and trust deed, theretofore made by Woodman & Bro. in his favor, to Oatis, and by such indorsement clothed Oatis with all the "rights and privileges, and such title as vested in" him (Gross), to the property described in the trust deed. Gross, by this act, held Oatis out to the world as the absolute owner of the note and trust deed, with the right to deal with the same according to his own pleasure, and thereby, even if we accept his theory of the character of the understanding and agreement between himself and Oatis and Woodman, which resulted in the transfer of the Woodman & Bro. note and trust deed to Oatis, put Oatis in a position, not open to challenge, to impose upon innocent third parties, in any sale he might make of the paper. Gross must pay the penalty of his own folly, and bear the loss of his security rather than the Johnsons, provided their conduct in the purchase of the paper was characterized by good faith. We have been unable to find, in the record before us, any satisfactory evidence of bad faith on the part of the Johnsons; they appear to have been purchasers from Oatis under the authority to sell and transfer the paper conferred by Gross, and appearing on the paper itself, and there were no circumstances attendant upon the purchase by them which may be held sufficient to rouse any suspicion that Oatis had no authority to do what he

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proposed with the Johnsons to do, and which Gross' written indorsement on the paper empowered him distinctly to do.

The question in this case is, were the Johnsons *bona fide* holders of the paper indorsed by Gross to Oatis, and by Oatis indorsed to them? If they were not—if fraud tainted their purchase—they had no title to the paper. If they were, they should be made secure, not in the amount of money laid out by them in purchasing the paper, but in the fruits of the property to which they acquired title. The learned court below only erred in not denying the appellant any relief. It is true, Gross, under his subsequent or intervening trust deed from Oatis, had an equity in the cattle embraced in the trust deed, but, on the facts disclosed, that equity was utterly worthless, and any attempt to work it out by the court was idle, because the debt secured by the trust deed assigned by Oatis to the Johnsons was largely in excess of the value of the cattle, as appears conclusively from an inspection of the transcript. The Johnsons had also bought the equity of redemption of the Woodmans, and having a debt confessedly larger than the value of the property intended to secure it, Gross was left remediless, as to the cattle, under his deed of trust from Oatis.

The decree on direct appeal is affirmed, and reversed on cross appeal, and appellant's bill is dismissed. Let the proper order be here entered.

F. M. ANDREWS v. NEW ORLEANS BREWING ASSOCIATION.

CONTRACTS. *Illegality. Right to withhold property.*

A party to a past transaction cannot withhold its gains from another party thereto on the ground of its illegality. *Gillum v. Brown*, 43 Miss., 641; *Howe v. Jolly*, 68 Ib., 323.

FROM the circuit court of Warren county.
HON. W. K. McLAURIN, Judge.

Brief for appellant.

This was an action for money had and received. On the trial, the defendant introduced evidence tending to show that the plaintiff, at the time the indebtedness was contracted, was doing business in Vicksburg as a wholesale dealer in malt liquors, and had not paid the privilege tax required by law. The court below gave a peremptory charge in favor of the plaintiff, and, defendant's motion for a new trial having been overruled, he prosecuted this appeal.

Miller, Smith & Hirsh, for the appellant.

The plaintiff seems to be debarred of all remedy by two provisions of our statute law. By § 3401, code 1892, it is provided contracts made in reference to the business carried on in violation of the privilege shall be void so far as the person in default may base any claim thereon; and by § 849, same code, it is provided that foreign corporations shall not do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.

It is the universal principle that any contract entered into with the mutual intent to evade the laws of the place where it is executed, is void, and especially is this rule applied to contracts relating to the sale of liquor. 9 Am. & Eng. Enc. L.; *Armstrong v. Toler*, 11 Wheat. (U. S.), 258.

This is not a suit upon a contract which is collateral to or independent of the original illegal contract or transaction, but it is a suit to recover the proceeds of an illegal business, which went into the hands of the defendant, under a distinct agreement that he was to receive these proceeds, and now having violated that agreement, the plaintiff comes into court to make him carry out the contract, to wit: To pay the proceeds arising from the sale of the keg beer, which was sold without any license on the part of the brewing association, and was sold, moreover, under the sham and subterfuge that the defendant's firm, the Vicksburg Liquor & Tobacco Company, were pre-

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tending to sell it as its beer, when, in point of fact, it was the beer and business of the New Orleans Brewing Association. *Miller v. Ammon*, 145 U. S., 421; *Collins v. Blanton*, 2 Wils., 341; *Jackson v. Dasher*, 3 Term R., 507.

A. M. Lea, for the appellee.

The beer was sold by Kain, agent of appellees, and the proceeds thereof, which make up the account sued on, were paid to appellant for appellee's use. The interdicted transactions are completed, the sales made, and the price paid, and the appellant cannot refuse to account for the money so received, on the ground that it represents the proceeds of illegal sales of liquor. *Brooks v. Martin*, 2 Wall., 81; *McBlair v. Gibbs*, 17 How., 236; *Tenant v. Elliott*, 1 B. & P., 3; *Farmer v. Russell*, 1 B. & S., 296; *People's Bank v. Railroad Co.*, 65 Miss., 365; *Crum v. Shoe Co.*, 72 Miss., 458; *Lawson's Rights & Remedies*, secs. 2014, 2552.

Woods, J., delivered the opinion of the court.

Without expressing any opinion as to the illegality of the business carried on in Vicksburg by the appellee, under its arrangement with the Vicksburg Liquor & Tobacco Company, it is clear that such illegality may be conceded, and yet the appellee's right to recovery is not affected thereby. For, conceding the illegality of the business, the question still remains whether the appellant company can be allowed to receive, for the appellee's use, money which arose out of an illegal transaction, then consummated and ended, and retain it as against the appellee, for and on whose account it was received.

It is unnecessary to discuss the question, for it was long ago carefully and elaborately examined and definitely settled in this state in *Gilliam v. Brown*, 43 Miss., 641. Said this court in that case: "The principle seems to be well established that after the illegal contract had been executed, one party in possession of all the gains and profits resulting from the illicit

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traffic and transaction, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law, and, therefore, the plaintiff, jointly interested in its gains and profits, cannot ground any claim to an account and share thereof." In *Howe v. Jolly*, 68 Miss., 323, *Gilliam v. Brown* was cited and followed, and this question declared to be "completely settled by that case."

Affirmed.

C. N. D. CAMPBELL v. N. D. TRIPLETT.

1. JURISDICTION. *Attachment. Judgment in personam.*

A judgment for the debt in attachment should be set aside for want of jurisdiction when there has been no levy upon property or garnishment in the county where the action was brought, although an alias writ of attachment has been served upon the defendant, as a summons, in another county, where he resides.

2. SAME. *Venue.*

The venue of actions *in personam* is "in the county in which the defendants, or any of them, may be found."

FROM the circuit court of Winston county.

HON. A. G. MAYERS, Judge.

The original writ of attachment herein, issued in 1891, was returned by the sheriff of Winston county "No property found. Defendant not found in my county." A similar return was made on an alias writ issued to Attala county; and an alias writ issued to Leflore county was returned "No property found," but the defendant, Campbell, was summoned in the last mentioned county, which is and then was his place of residence. At a subsequent term of the circuit court of Winston county, in January, 1893, a judgment by default for the indebtedness was entered against the defendant; and afterwards, in January, 1896, the defendant, by his petition, setting

Brief for appellee.

forth the above facts, applied to the court to set aside and vacate the judgment for want of jurisdiction. The plaintiff, Triplett, demurred to the petition, and, his demurrer having been sustained, this appeal was prosecuted.

Calhoon & Green, for the appellant.

1. The jurisdiction of actions commenced by attachment attaches only upon a levy on property or service of garnishment. Either the defendant himself or his property or debts must "be found" in the county of trial to warrant any valid judgment, and property or debts are essential. *Barnett v. Ring*, 55 Miss., 97; code 1892, § 133; *Crizer v. Gorren*, 41 Miss., 564; *Smith v. Mulhorn*, 57 *Ib.*, 591; *Baum v. Burns*, 66 *Ib.*, 127. Defendant was under no obligation to appear and plead until jurisdiction had attached by levy on property or service of garnishment.

2. Code 1892, § 650, has no relevancy to cases by attachment. See cases *supra*, and *Jefferies v. Harvie*, 38 Miss., 97; *Roy v. Heard*, 38 *Ib.*, 544.

Coleman & Somerville, on the same side.

1. There was no levy upon property or service of garnishment, and, in consequence, the suit failed, and should have been dismissed for want of jurisdiction. Code 1892, § 133; *Baum v. Burns*, 66 Miss., 127.

2. As the defendant was never before the circuit court prior to judgment, there was no reason why he should avail of § 650, code 1892, providing for a change of venue to the county of his residence.

Jones & Hughston, for the appellee.

A suit in attachment is both a proceeding *in rem* and *in personam*. Indeed, it is two suits, and the one is independent of the other to the extent, at least, that there may be a recovery of the debt although there was no ground of attachment. Code

Opinion of the court.

1892, §§ 172, 4. The defendant should be taken to have waived his right to remove the suit to the county of his residence under § 650, code 1892. *Christian v. O'Neal*, 46 Miss., 669; *Cain v. Simpson*, 53 *Ib.*, 521. The case of *Baum v. Burns*, 66 Miss., 127, is distinguishable from the present controversy by the fact that in that case there was a plea in abatement to give the jurisdiction and localize the action, while here there was merely a judgment on the merits without action on the grounds of attachment. The petition fails to show that the defendant resided in Leflore county when the action was commenced, as contradistinguished from the date of service of the writ upon him.

COOPER, C. J., delivered the opinion of the court.

None of the writs of attachment were served as such, and as writs of attachment they go for naught; no jurisdiction in the cause was therefore secured by seizure of the property of the defendant. The writ, as a summons, was served upon the defendant in another county, and on this service the circuit court of Winston county rendered judgment by default against him. The court had no jurisdiction over defendant, and the motion to vacate the judgment should have been sustained. The venue of civil actions of this class is in the county "in which the defendants, or any of them, may be found," and if no defendant is served with process in the county in which the suit is brought, the jurisdiction of the court does not attach. *Wolley v. Bowie*, 41 Miss., 553; *Pate v. Taylor*, 66 *Ib.*, 97.

The judgment is reversed, the motion sustained to vacate the original judgment and the cause dismissed.

Brief for appellant.

ELIAS HUGHES v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Larceny. Ownership of property. Insufficiency of affidavit. Motion in arrest of judgment.*

An affidavit charging the larceny of cotton from affiant's premises, shown to be a farm, is insufficient, if it contains no averment that the cotton was the property of another than the accused; and the defect, being one of substance, may be availed of in arrest of judgment.

FROM the circuit court of DeSoto county.

HON. EUGENE JOHNSON, Judge.

The appellant was prosecuted for stealing seed cotton of the value of \$20. The affidavit alleged that it was stolen from the premises of J. D. Nichols, the affiant, but did not allege that it was the property of Nichols, or any other person than the accused. The evidence showed that the cotton was stored in a cotton house on the plantation of Nichols. The defendant was found guilty, and a motion was made in arrest of judgment, on the ground discussed in the opinion of the court, upon the overruling of which this appeal was taken.

Mial Wall, for the appellant.

1. The affidavit was fatally defective in not alleging either ownership or possession of the cotton in some person other than the accused. 2 *Wharton on Crim. L.*, secs. 1820, 1833; 3 *Greenl. on Ev.*, sec. 154; *McDowell v. State*, 68 Miss., 348; *Long v. State* (Tex.), 20 S. W. Rep., 576; *Com. v. Morse*, 14 Mass., 217, 218.

2. This fatal defect is not cured by § 1341, code 1892. *Newcomb v. State*, 37 Miss., 383. See, also, *Luck v. State*, 64 Miss., 848; *Newman v. State*, 69 *Ib.*, 394.

Opinion of the court.

Wiley N. Nash, Attorney-general, for the state.

Whether or not the affidavit was defective in not alleging that the cotton was owned by, or in the possession of, affiant, it was too late to make the point for the first time by motion in arrest of judgment. Code 1892, § 1354; *Gates v. State*, 71 Miss., 875. The affidavit alleged that the cotton was on affiant's premises when stolen, and any objection to the sufficiency of that averment—as, charging that the asportation was against affiant's right—should have been made before verdict. Code 1892, § 1341; *Norton v. State*, 72 Miss., 132. The offense was charged with sufficient clearness. *State v. Whitney*, 15 Vt., 298; *State v. Edwards*, 19 Mo., 674; *George v. State*, 39 Miss., 570.

Argued orally by *W. N. Nash, Attorney-general, for the state.*

WOODS, J., delivered the opinion of the court.

The motion in arrest of judgment should have been sustained. The cotton charged in the affidavit to have been stolen was not laid as the property of affiant or as in his possession, when alleged to have been stolen and carried away. It is matter of common knowledge that, on almost every plantation, others beside the owner of the plantation itself—the premises—both own, and are in possession of, their own personal property. The defect is one of substance and not form, and may be taken advantage of by motion in arrest, as well as by demurrer before trial.

Reversed and remanded.

Brief for appellant.

JOHN ALBIN v. M. C. HOWARD.

TRIAL OF RIGHT OF PROPERTY. *Business sign. Code 1892, § 4234.*

The goods of a merchant, whose business sign does not indicate ownership in the defendant in execution, are not liable to the creditor of such defendant because the merchant caused goods, purchased by him, to be shipped in such defendant's name, and carried on the business correspondence and paid privilege tax in such name, without the knowledge or consent of the party whose name was so used.

FROM the circuit court of Holmes county.

HON. C. H. CAMPBELL, Judge.

Howard, appellee, obtained a judgment against Mrs. Shoemaker, and caused an execution thereon to be levied upon a stock of merchandise which was claimed by Albin, appellant. A trial of the right of property was had, resulting in a verdict and judgment for the plaintiff in execution. The claimant appealed. Both parties asked peremptory instructions; the court below gave the one asked by the creditor, and refused that asked by the claimant. The other facts are sufficiently stated in the opinion of the court. It may be added, however, that the evidence showed that Albin kept a bank account in the name of "Mrs. Shoemaker, Agent," but this was unknown to her until a short time before the levy of the execution.

Noel & Pepper, for appellant.

If the evidence raises any conflict in regard to the question as to whether or not this case falls within § 4234 of the code, the action of the court is erroneous. That section covers two classes only: (1) Where a person transacts "business as a trader or otherwise, with the addition of the words 'agent,' 'factor' and 'company,' or '& Co.,' or like words, and fails

Brief for appellant.

to disclose the name of his principal or partner by a sign," etc.; (2) where a "person shall transact business in his own name, without any such addition." In each of the classes there must be an actual transaction of business by the person to be charged. If the business is not carried on in his own name, it must, under the terms of the statute, be carried on by the person against whom liability is sought, as agent of a principal, or of a partner whose name is not disclosed by a sign. The liability is aimed at the person who is operating the business as ostensible owner, and who controls and directs affairs. *Gumbel v. Koon*, 59 Miss., 267.

The evidence clearly shows that in this case it was Albin's creditors, and not Mrs. Shoemaker's, who could have availed themselves of the benefit of the statute. The most that Mrs. Shoemaker's creditors could contend for would be that her name had been so connected with the business that a common law liability would attach for credit extended upon the faith of the use of her name in connection with the business. The statutory liability could not apply both to her creditors and to those of Albin.

In *Hamblet v. Steen*, 65 Miss., 477, the lease of the stable, the privilege license to carry it on, the bill of sale and ownership of the property, were in Mrs. Hamblet, whose husband conducted the business under the sign "Carr Stable." He sometimes spoke of the business as his own and acted as proprietor. The court held in that case that the statute did not "have the effect to permit one to do business in a fictitious name or in the name of some one not the owner of the property, and thus escape its consequences. That is the very evil which it was made to extirpate." If Hamblet's creditors were the ones protected by the statute, his wife's creditors could not have been. So, in this case, if Albin's creditors could have seized the property (and they would have had a much better case than Hamblet's), Mrs. Shoemaker's creditors could not have done so under the statute.

Opinion of the court.

Hooker & Wilson, for appellee.

The case of *Quin v. Myles*, 59 Miss., 375, is exactly like the case at bar. In the case cited, Wachenheim & Herman put up the money, furnished all the goods and capital, and opened up business in the name "Henry Bazinsky & Co." The creditors of Bazinsky levied on the goods, and took them for their debts, and the court adhered to the rule that the statute (§ 4234, code 1892) will be enforced, whether the debts sought to be collected were antecedent or subsequent to the inauguration of the business.

Argued orally by *E. F. Noel*, for appellant, and by *G. A. Wilson*, for appellee.

WOODS, C. J., delivered the opinion of the court.

Undisputedly, Albin purchased the stock of goods with his own means; he rented or owned the house in which the business was conducted, and had sole and exclusive control and management of the same. The business was transacted by him, and the execution debtor appears never to have been in the store where the goods were found when levied upon, except on one occasion. The fact that Albin had the goods shipped in her name, that the privilege tax license was taken out by him in her name, and that he carried on the correspondence connected with the business in her name, all originally without her knowledge and consent, in the light of all the other evidence in the case, cannot be regarded as tending to establish ownership in Mrs. Shoemaker. There was no sign proclaiming her to be the owner, and she did not transact the business.

The case is perfectly covered by the case of *Hamblet v. Steen*, 65 Miss., 477, and the appellant was entitled to a peremptory instruction.

Reversed and remanded.

Brief for appellant.

J. M. McDOWELL v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Larceny. Promissory note. Value of same. Code 1892, § 1176.*

Under § 1176, code 1892, providing that "if any person shall steal any . . . note . . . the money due thereon, . . . shall be deemed the value of the article stolen, without further proof," it is not error upon the trial of one charged with the larceny of a promissory note, to exclude evidence offered to show that the paper was uncollectible by reason of the insolvency of the makers and their refusal to pay, and therefore worthless, or at least under the value of twenty-five dollars.

FROM the circuit court of Wilkinson county.

HON. W. P. CASSEDY, Judge.

The opinion states the case.

Bramlett & Tucker, for the appellant.

The essential element of the crime of larceny is the stealing of something valuable; and the two classes of larceny—grand and petit—are distinguished by the fact of whether or not the subject of the theft is under the value of twenty-five dollars. Code 1892, §§ 1173, 1174. Under the ruling of the court below, it is not necessary either to allege or prove the value of any of the writings mentioned in § 1176, code 1892. This interpretation of that section must be erroneous, for, otherwise, the theft of a Confederate States bond for \$100, or a Union Bank bond of the same amount, neither of which have any real value, would be grand larceny, while the theft of twenty-four dollars in gold would be petit larceny. Absurdity can go no further than this proposition. The statute could not have meant more than that the face value should be taken *prima facie* as the actual value.

Opinion of the court.

Wiley N. Nash, Attorney-general, for the state.

The question presented on behalf of the appellant is set at rest by § 1176, code 1892. The terms of the statute are too plain for comment. *Ita lex scripta est.*

WOODS, J., delivered the opinion of the court.

After the prosecution had proved the commission of the felony charged, to wit, the larceny of the two promissory notes set out and described in the indictment, the prisoner offered to show "that the notes specified in the indictment were not collectible by law, on account of the insolvency of the makers and (their) refusal to pay the notes, and therefore that they are worthless, or, at least, under the value of twenty-five dollars," but, the state objecting to the introduction of this evidence, the court declined to permit the same to go to the jury. This ruling of the court is assigned for error by counsel for the defendant. The action of the court was so manifestly correct that it is only necessary to quote § 1176, code of 1892, viz.: "If any person shall steal any bond, covenant, note, bank bill, bill of exchange, draft, order, receipt, or other evidence of debt, or chose in action, or any public security issued by the United States, or any state, or any instrument whereby any demand, right, or obligation shall be created, increased, released, extinguished, or diminished, the money due thereon, or secured thereby and remaining unsatisfied, or which, in any event, might be collected thereon, or the property transferred or affected thereby, as the case may be, shall be deemed the value of the article stolen, without further proof thereof."

The offer of defendant was not to show that no money was due on the notes, or that no money was secured by the notes and remained unsatisfied, or that money, in any event, might not be collected on the notes proved to have been stolen. The statute was designed to relieve the state from the burden of proving the actual value of bonds, bills, notes, etc., by making the face value to be deemed the real value, without further

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proof. It surely was never before thought that two insolvent debtors, who had refused to pay their indebtedness, might steal the evidence of their indebtedness and successfully plead insolvency and a refusal to pay in justification of the larceny. We discover no error in the charges given for the state, unless, indeed, instruction three is too favorable to the accused, but of this the defendant cannot complain.

Affirmed.

EQUITABLE FIRE INSURANCE CO. v. R. H. WILDBERGER.

1. PRINCIPAL AND AGENT. *Instructions.*

It is the duty of an agent to obey the instructions of his principal so long as the instructions are neither unlawful nor immoral.

2. SAME. *Disobedience.*

If an agent enter upon a transaction in disobedience of his instructions, he cannot recover from his principal money paid out in such transaction.

3. INSURANCE AGENT. *Instructions.*

If an insurance agent, in violation of the instructions of his company, without being requested so to do by the policy holders, cancels policies issued by him, he cannot recover from the company the portions of premiums returned to the policy holders.

FROM the chancery court of Lauderdale county.

HON. N. C. HILL, Chancellor.

Wildberger, the appellee, was the agent, at Clarksdale, of the Equitable Fire Insurance Company, a corporation domiciled at Meridian. The company decided to go out of business, and wrote Wildberger the following letter, viz.:

“MERIDIAN, MISS., August 1, 1891.

“R. H. Wildberger, Esq., Agent, Clarksdale:

“DEAR SIR.—The Equitable Fire Insurance Company has decided to retire, and you will therefore write no further busi-

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ness for us from this date. The business in force will be reinsured in a few days. Negotiations are pending, and will doubtless be closed by the tenth instant. There is no stampede at all, and we ask your assistance to prevent any. We are not broke. The company is perfectly solvent. Just let business stand, and if any losses occur they will be settled as usual, and when negotiations are closed a new company may be added to your agency. Will settle Ward loss as soon as we get our re-insurance off and the time expires. Yours truly,

“J. C. LLOYD, *Secretary.*”

Upon receipt of this letter Wildberger at once, and without request from the policy holders, so far as the record shows, canceled all of the outstanding policies in the appellant company which had been issued by him, paying to the policy holders a ratable proportion of the premiums for the unexpired terms of their policies. Some of the policies for which “return premiums” were charged, had, perhaps, been canceled by Wildberger before he received the letter. Each of the policies so canceled contained the following provisions: “*Cancellation of policy.*—This insurance may be terminated at any time, at the request of the assured, in which case this company shall retain the customary short rates for the time the policy has been in force. It may also be terminated at any time, at the option of this company, on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy.” It was shown in evidence that if a policy was canceled at the request of the assured, the company would return less of the premium than it would refund if the cancellation was made by the company on its own motion.

The affairs of the insurance company having been placed in the hands of a receiver by the chancery court, Wildberger propounded his claim therein, and the court below decreed him entitled to recover the money paid by him to the policy holders whose insurance he had canceled, and, notwithstanding it did

Brief for appellant.

not appear that they had requested the cancellations, he was, by the court below, allowed, according to the *pro rata* method, a ratable proportion of the premiums for the unexpired terms of the policies.

Cochran & Bozeman, for appellant.

The only parties to this suit are principal and agent, and the question here is a determination of their duties and liabilities *inter se*, under the facts in evidence.

Under a given state of facts—as, where an agent acts contrary to the interest of his principal, and in violation of his principal's instructions, and yet within the apparent scope of his authority—the rights of the third person with whom the agent deals, as against the principal, and the accountability of the agent to his principal, may be widely divergent.

The act of the agent may bind his principal, and yet the agent may be liable to the principal for any loss incurred or injury done. In this case we submit that the decree below was erroneous, and that the appellee, Wildberger, agent of the appellant company, is not entitled to recover the return premiums of the company, especially at *pro rata* rates, because (1) his agency for the company had been revoked and terminated prior to his cancellation of the policies, and he had no authority to cancel the policies as agent for the company; (2) if the agency had not been revoked, the appellee, in cancelling the policies, acted in direct violation of the plain instructions of the company, his principal; (3) he acted in hostility to the company's interest, in bad faith to his principal, and for the benefit of those having conflicting interests; (4) he acted in the dual and inconsistent capacity of agent for both parties, the company and the insured, having conflicting interests, which act was promptly disapproved by the company and ratified by the insured.

The rule of law is well established that the principal has a right to control the action of his agent by instructions. *Robertson v. Cloud*, 47 Miss., 208 (209).

Opinion of the court.

G. Q. Hall, for appellee.

An insurance company cannot, without the consent of the assured, shift its contractual liabilities to the shoulders of some other company. *Smith v. St. Louis Mutual, etc., Co.*, 2 Tenn. Chy., p. 736. The appellant company had decided to go out of the business. It recognized the necessity for cancellation of the policies. The contract, as embodied in its policy, stipulated that, where cancellation was had, save at the instance of the assured, it should be upon condition of return of the full unearned premium. The agent so recognizing did that which the company was bound both by law and its contract to do, to wit, cancel the policies and return to the assured the full amount of the unearned premium, and his present claim is to be reimbursed by the company for the amount so by him expended.

Mr. Wildberger did that which it was the legal duty of the corporation to do, and which any court of competent jurisdiction would have forced it to do, and he is entitled to be reimbursed the moneys thus advanced by him for his principal.

Argued orally by *G. Q. Hall*, for appellee.

WOODS, J., delivered the opinion of the court.

Wildberger was the agent of the appellant, and was bound to obey the instructions of his principal so long as those instructions were neither unlawful nor immoral. Instead, however, of obeying the instructions of his principal, contained in the letter of the company's secretary, of date August 1, 1891, the appellee, on the very day he received this letter, or perhaps before, canceled all the policies of the company which had been issued by him, and the unearned premiums were by him returned to the policy holders under the *pro rata* method. If these policies were really canceled at the request of the policy holders, which does not appear to have been the case, then the unearned premiums returned to policy holders should have been at short rates, as their contracts distinctly stipulated, and the

Brief for appellant.

sum of these short rate premiums subtracted from the premiums paid by the assured, would be the measure of the company's liability to the appellee. If, however, the appellee, in the face of his instructions from his principal, and of his own motion, and not at the request of the assured, canceled the policies and returned premiums to policy holders who had not requested cancellation, then, of course, for such wilful and unauthorized action, he must fail of any recovery. It appears, moreover, that a number of the policies which are said by the appellees to have been canceled by him under the circumstances above enumerated, have never been returned to his principal. This must be done, or their nonreturn satisfactorily accounted for.

Reversed and remanded.

UNIAS LUNENBERGER v. STATE OF MISSISSIPPI.

CRIMINAL LAW. *Justice of the peace. Judgment. Failure to enter.*

The failure of a justice of the peace, for the lapse of several days after a trial and conviction and the adjournment of his court, to enter judgment against the accused, being merely clerical, affords no ground for the offender's discharge.

FROM the circuit court of Pike county.

HON. W. P. CASSEDY, Judge.

The opinion states the case.

Mixon & Lotterhos, for the appellant.

The appellant should have been discharged on his motion to that end. The testimony showed that neither the verdict nor judgment were entered by the justice of the peace until several days after the adjournment of the term at which appellant was tried, and no memorandum whatever of the result of the trial being made on his docket. *McQuillen v. State*, 8 Smed. &

74	379
74	880

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M., 587; *Gray v. Thomas*, 12 *Ib.*, 111; *McCarthy v. State*, 56 Miss., 294; *Shackelford v. Levy*, 63 *Ib.*, 125.

Wiley N. Nash, Attorney-general, for the state.

The cases cited on behalf of appellant have no application, as they all relate to the judgment of the circuit court, and not of a justice of the peace. A justice of the peace is required to keep a docket for civil and criminal matters. As to the latter, his court is always open, and warrants may be made returnable before him at any time. Code 1892, §§ 2397, 2421. It would be against public policy to enforce, as to justices of the peace, the strict requirement involved in the appellant's contention. See *Prewett v. Nash*, 50 Miss., 584. The law prescribes no time within which they shall make entries on their dockets.

WOODS, C. J., delivered the opinion of the court.

The motion of the defendant to be discharged, because of the failure of the justice of the peace to perform the mere clerical act of entering up the judgment actually rendered for two days, was properly overruled. The entry of the judgment which had been rendered was merely clerical, and, in this case, it is undisputed that the judgment was really rendered, and that a proper notation of the justice's action was then made in writing, and was transcribed in the docket two days later. See *Conwell v. Kuykendall*, 29 Kan., 707; *Freeman on Judgments*, sec. 53a, and cases there cited; 12 Am. & Eng. Enc. L., 459, and cases cited.

But the point seems to be definitely settled in this state in the case of *Swain v. Gilder*, 61 Miss., 667. Said Cooper, J., speaking for the court: "Judgments taken before justices of the peace are liberally construed by the courts, because of the unlearned character of the men by whom the office of justice is frequently filled, and because the justice, in entering the judgment, is performing a merely clerical duty. . . . If, all the facts being found, nothing was left but the clerical duty

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of entering up a final judgment, which it was the duty of the justice to perform in his clerical capacity, and the justice ignorantly failed to enter such judgment, but dealt with the record as completed, then the judgment, however irregular, informal, or defective, will be upheld."

The evidence of the witnesses, Coney and Safford, was competent. The evidence of these witnesses was not offered to show other and independent sales than that particular one for which the state prosecuted, but the purpose was merely to prove the intoxicating quality of the beverage sold, and this was legitimate.

Affirmed.

J. E. RIVES ET AL. v. ELLA H. PATTY, ADMX., ET AL.

1. ATTORNEY AND CLIENT. *Fees.*

The relation of attorney and client is created by contract, and litigants who have in no way assumed liability for attorney's fees cannot be held therefor, because they derived benefit, directly or incidentally, from the professional services rendered.

2. ATTORNEY'S SERVICES. *Fund realized.*

An attorney employed by some of the creditors of an insolvent estate, who realizes by his services a fund for distribution among all the creditors, cannot have the fund charged with his fees, but must look alone to those who employed him for compensation.

FROM the chancery court of Noxubee county.

HON. T. B. GRAHAM, Chancellor.

The estate of R. C. Patty, deceased, of which appellee, Ella H. Patty, is the administratrix, was declared insolvent, and notice was given to all creditors to present their claims for allowance. Certain of the creditors employed Messrs. Rives & Rives, lawyers, to represent their interest. These lawyers began proceedings to surcharge the administratrix's accounts,

Brief for appellants.

and instituted several suits, the object of all of which was to increase the assets of the estate, and they thereby succeeded in largely augmenting the funds for distribution. The funds being ready for distribution, appellant, J. E. Rives, survivor of the firm of Rives & Rives, and the several creditors by whom they were employed, filed petitions asking the court to charge the funds realized by the services of the attorneys with a reasonable solicitor's fee due Rives & Rives. The court below denied the prayer of the petitions, and the petitioners appealed.

J. E. Rives, pro se, and for other appellants.

The administratrix having failed, and continuing to fail, to properly administer the estate, but, instead thereof, having appropriated a large portion of the estate, appellants, W. M. Jones, J. H. Jones, W. S. Ferris, T. S. Murphy and W. I. Barnhill employed the firm of Rives & Rives to force the administratrix to properly manage and account for the assets of the estate, they being deeply interested therein as creditors. If all the funds of the estate realized belonged equally to all the creditors, irrespective of the source from which such funds were obtained, as has been decided by this court, then the services rendered on behalf of any one creditor necessarily injured to the benefit of all. The question presents itself, what was a creditor to do under such circumstances? Seeing that he was about to lose all, he was compelled to give up his whole rights or employ counsel to recover the common fund, while other creditors, who were either too penurious to employ counsel, or being satisfied with the services of the attorney employed, will keep quiet until the common funds are realized, then step up and claim the *pro rata*, at the same time flatly refusing to pay anything for the services rendered, claiming that he had not employed counsel.

It is shown that the firm of Rives & Rives were rightfully employed to protect the funds of the estate; that, in order to recover those funds and protect them, it became necessary for

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appellants to take the risks of costs and attorney's fees, and file independent proceedings against the administratrix and her sureties. It has been held that the amount finally recovered in this independent litigation was assets of the estate.

While W. M. Jones *et al.* had not agreed to pay any stipulated fee for the services rendered by their attorney, their petition shows that they were legally liable for a fee—a reasonable fee—not for their *pro rata* part of the recovery, but for the funds, the whole funds, recovered.

Now, the question presented is, is it just, and is it equitable, that the creditors, other than those who have appealed, shall share in these funds without paying their just proportion of the expenses and labor expended in the procuring of the funds for distribution. It has been held that they are entitled to share with the others; that distribution shall be made among all creditors “according to their rights.” I do not presume that this court ever intended that a distribution among all creditors “according to their rights,” meant that those who had parted with nothing should take their part freed from all expenses and fees, while those at whose instance the recovery was had should, out of their *pro rata*, pay all such fees and expenses.

C. B. Ames, for appellees.

It is difficult to discover the legal basis upon which appellants rest their claim. It cannot be upon the ground of benefit conferred, because a legal right must grow out of a legal relation, and there is no legal relation existing between appellants and the other creditors of the estate of Patty, arising either *ex contractu* or *ex delicto*. In every litigation there are persons, sometimes parties and sometimes not, who are benefited by the services of attorneys representing other parties to the suit, and yet the attorneys never claim compensation from any but their own clients. A familiar illustration is afforded by the practical operation of our proceedings in assignment cases. If any of the creditors employ an attorney to defend

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their interest under the assignment, his services inevitably inure to the benefit of creditors claiming under the assignment, but he can only claim compensation from his own clients, because he has no contract with anyone else. The following cases are conclusive against appellants: *Attorney-general v. North American Life Ins. Co.*, 91 N. Y., 57 (43 Am. Rep., 648); *Hand v. Savannah Railroad Co.*, 21 S. C., 162; *Ex parte Lynch*, 25 S. C., 193; *Hubbard v. Camperdown Mills*, 25 S. C., 496; *Roselius v. Delachaise*, 5 La. Ann., 481, s.c. 52 Am. Dec., 597.

Argued orally by *C. B. Ames*, for appellees.

WOODS, J., delivered the opinion of the court.

The effort of appellants to charge the fund in the hands of the administratrix with the attorneys' fees of Mr. J. E. Rives, in his own right, and as surviving partner of the firm of Rives & Rives, cannot be successfully maintained. That the services of the attorneys of the appellant creditors were valuable and important is clear, and that a reasonable fee should be paid them is not to be disputed. But shall this fee be paid out of the funds of Patty's estate, now ready for distribution to all the creditors, or shall it be paid by those creditors who employed the Messrs. Rives, and who have been greatly benefited by the services of their attorneys? The supposed right to charge the fund for distribution with the fees of the attorneys of a part of Patty's creditors rests upon the fact that this fund, and all the creditors to whom it is to be distributed, received, directly or incidentally, large benefits from the well-directed efforts of the attorneys employed by the appellant creditors, and that the fund itself should bear the expenses of the successful attorneys' fees, although Messrs. Rives & Rives were confessedly employed by the appellant creditors, and notwithstanding the fact that the effort of their attorneys was, in the main, directed to the securing of all the benefits flowing

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from their services to their own clients, and to the exclusion of all other creditors of Patty.

The attorneys, in serving those who employed them, have incidentally served all the other creditors, but those others are not thereby brought under obligation as clients to the Messrs. Rives, nor made liable to compensate those gentlemen for services rendered by virtue of employment by the appellant creditors. The relation of attorney and client is created by contract, and we are not aware of any principle of law or equity which would justify the imposition of attorneys' fees upon litigants who have not assumed liability therefor, either because they have other counsel of their own selection, or because they have elected to employ no counsel, and take the chances of success in the courts without representation of lawyers. It appears to us that it would be a dangerous precedent for litigants, however advantageous to lawyers, if we should hold that counsel may intervene to protect the interests of persons who have not signified any desire for the services of counsel, and, upon success crowning the efforts of such counsel, impose liability upon the unwilling litigants to pay attorneys' fees. It would seem almost as dangerous to compel litigants in a common cause to bear the expenses of counsel fees incurred by their fellow-litigants, though without their procurement or consent, because of incidental benefits resulting from the services of the attorneys of the fighting litigants.

In *Roselius v. Delachaise*, 5 La. Ann., 481, a case whose essential facts bring it in the category of the case in hand, this language is employed: "However valuable the services of the plaintiff may have been, which do not appear to be underrated by the defendant herself, yet as she did not employ him, or authorize anyone else to employ him in her suit, the present action cannot be sustained."

The same view, in a similar case, was held in *Chicago, etc., Railroad Co. v. Larned*, 26 Ill., 218. To the same effect is *Turner v. Myers*, 23 Iowa, 391. See, also, *Attorney-*

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general v. N. A. Life Ins. Co., 91 N. Y., 57. See, too, *Hand v. Savannah, etc., Railroad Co.*, 21 S. C., 162, in which it is held, in this character of case, that "no one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another, by whom he may have been employed."

Affirmed.

W. T. McGEHEE ET AL. v. JOHN S. McGEHEE.

1. WILL. *Construction.*

The true rule for the construction of a will is to ascertain the intention of the testator from the will itself—the whole will taken together, including codicils, if there be any.

2. SAME. *Revocation. Codicil.*

Where a devise or bequest in a will is clear and free from doubt, the intention to revoke by a codicil must be equally clear and explicit in order to work a revocation.

FROM the chancery court, first district, of Panola county.

HON. B. T. KIMBROUGH, Chancellor.

Mrs. Anna Dandridge died in 1888, leaving a will of date January, 1870. By the third item thereof it was provided: "I will and bequeath to my niece, Emma L. McGehee (daughter of the late Edward McGehee and my sister, Sarah E. McGehee), Hollywood house, with the household and kitchen furniture, and the section of land upon which the house stands (section 32); and I do this not only from my attachment to her, but because the place is dear to her, having been the home of McGehee Dandridge, hoping she may reside here and have a care over the plots at Fredonia cemetery, in which we are mutually interested."

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After the date of the will Emma L. McGehee married one Yarbrough, and then testatrix executed a second codicil to said will (the first codicil being of no significance in this case), which, so far as concerns the question before the court, was in these words, viz.: "To Emma McGehee Yarbrough I give and bequeath Hollywood house, with household and kitchen furniture and the section of land (thirty-two) on which domicile stands, as mentioned in item three of my will, for her separate use and benefit. Should she die childless, to revert to the legatees of my estate."

Emma McGehee Yarbrough having died, the testatrix, on the twenty-seventh day of May, 1877, made a third codicil in these words, viz.: "I do here will and bequeath Hollywood house, household and kitchen furniture, with the section of land (32) on which it stands, to my sister, Mrs. Sarah E. McGehee. I also revoke the bequest for monument over my grave, preferring that anything saved from the wreck of my estate be given to my heirs."

By a fourth codicil, executed May 26, 1880, the testatrix provided: "In the event of my sister's (Sarah E. McGehee) death, Hollywood house, section of land (32), etc., to descend to her second son, John Scott McGehee."

A fifth codicil to said will was executed by the testatrix, and it was as follows: "I hereby revoke all codicils and bequests, save my dwelling house and furniture belonging to the same, even the life insurance policy must go to a debt created last summer to W. T. McGehee, of Bolivar."

The will and codicils having been duly probated, the suit was brought by Sarah E. McGehee, who died pending the suit, and John Scott McGehee against the heirs of the testatrix and other legatees and devisees, in order to have the will construed and their title to Hollywood house and the section of land upon which it stands, section 32, adjudged and quieted.

The court below decreed in complainant's favor, and the defendants appealed.

Brief for appellees.

R. H. Taylor and J. B. Boothe, for appellants.

Our contention is that the fifth codicil, the last one, revoked the third and fourth codicils. It says: "I hereby revoke all codicils and bequests, save my dwelling house and furniture belonging to the same," etc. Did the testatrix mean by "my dwelling house," the whole of section thirty-two? Surely not, because we find her making several testamentary dispositions of the entire section, and in each instance she used appropriate language to effect her purpose. In the will itself, item third, it is devised as "Hollywood house, with the household and kitchen furniture, and the section of land upon which the house stands, section thirty-two." And the second codicil devises the section of land as "Hollywood house, with household and kitchen furniture, and the section of land (32) on which domicile stands." By the third codicil the land is devised as "Hollywood house, household and kitchen furniture, with the section of land (32) on which it stands." By the fourth codicil the description is "Hollywood house, section of land (thirty-two)," etc. Each of these instances shows, and they conjointly convince, that the testatrix distinguished between Hollywood house and the section of land. If she did not, by the last codicil, intend to revoke the bequest of section thirty-two, it is clear that she would not have used the language therein employed. Certainly the devise is so uncertain, putting it strongest against appellants, that the court below should not have adjudged title to section thirty-two in complainant.

F. B. Poston, for the appellees.

The language, "I hereby revoke all codicils and bequests save," etc., is a complete revocation of all the bequests and all codicils of the will, to every person named and of every character, except one class—that is, "save" or excepting the codicils or bequests of the "dwelling house and furniture belonging to the same," which codicils three and four, devising the dwelling house known as "Hollywood," furniture, section of

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land, etc., and the bequests of that property are in nowise revoked and annulled. In other words, as I construe this language in connection with the manifest intention and purpose of the testatrix as shown in other parts of this will, it is as if the codicil read: "I hereby revoke all codicils and all bequests save those codicils relating to and the bequests of my dwelling house," etc., and therefore, the excepted codicils and bequests which dispose of this property are in nowise affected or annulled.

The word "save," as used in this codicil, ordinarily and technically means "to reserve, exempt out of, to preserve, to suspend the operation of." Anderson's Law Dictionary. So that if the codicil relating to and the bequests of this property are "reserved," "preserved," "exempted out of," or "suspended from the operation of" the codicil in question, it is clear that codicils three and four must stand intact, as they are not revoked by it. And, so far as this property is concerned, it is the same as if the last codicil had not been written.

It cannot be doubted that the testatrix intended to "reserve" or "exempt" or "save" something from the sweeping revocation of the last codicil. This revokes and annuls all the "codicils" and all the "bequests" contained in the previous parts of the will, including its codicils, "save" or excepting from its operation one class of codicils and the one class of bequests relating to Hollywood house (called "my dwelling house"), the furniture and the land. Any other construction would revoke the entire will, and leave Mrs. Dandridge dying intestate as to all of her property, both real and personal. It is a settled rule that a testator is presumed not to die intestate as to any of his property, and the will is not to be construed to effect this end, unless it clearly appears that the testator so intended.

As I understand the contention of the defendants in this case, it is their insistence that the last codicil to the will should be so construed as to confine the saving or reserving clause of it to simply the dwelling house upon the section of land 32, and the

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furniture therein, so as not to include the land itself. In other words, that Mrs. McGehee, under the third codicil of the will, and her son, John S. McGehee, under the fourth codicil, only took title to the dwelling house proper and the furniture, and to no part of the land. Now, it is manifest that it was never the intention or purpose of the testatrix to separate the house from the land, which would be necessary if this construction is to obtain. It will be noticed that the will is inartificially drawn, and this fact can be explained by the statement annexed to the original will, that it was acknowledged in the presence of the witnesses, by Mrs. Dandridge, to have been wholly written and signed by her.

STOCKDALE, J., delivered the opinion of the court.

We are asked to reverse the judgment of the court below, whereby it was decreed that the title to certain property, therein described as Hollywood house and furniture, and the land on which it stands (section 32), vested in John Scott McGehee, in fee simple, upon the death of Sarah E. McGehee. The contention of appellants is that the last codicil revokes the devise of section 32. Counsel on both sides lay down the correct rule of construction of wills—that is, to ascertain the intention of the testator from the will itself, the whole will taken together, including codicils, if there be any. Consulting this will with its codicils, it appears that the testatrix, by item three, wills Hollywood house and furniture, and section 32, on which it stands, to a favorite relative, Emma L. McGehee, and gives a reason for it, saying that she did that “not only from her attachment to Emma McGehee, but because the place is dear to her, having been the home of M. G. Dandridge, hoping she may reside there and have a care over the plots at Fredonia cemetery, in which they were mutually interested.” After Emma McGehee married Mr. Yarbrough, by codicil two, October 1, 1875, testatrix willed this same property to her again, by her married name, Emma McGehee Yarbrough. After her

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death, testatrix willed this same property to her sister, Mrs. Sarah E. McGehee, by codicil three, May 27, 1877. And by codicil four, May 26, 1880, she limited Sarah E. McGehee to a life estate, and willed it in fee to her son, John Scott McGehee, as remainderman. As throwing some light on the intention of the testatrix, we note that, after the death of Emma Yarbrough, she did not let this devise stand to descend to the Yarbrough heirs, to whom the place might not be so dear, and who might not have a care over the cemetery, but changed the devise, by codicil three, so that this cherished home should go to her sister, Mrs. Sarah E. McGehee, seeming to desire this home to remain in the family, and later seemed to further that object by codicil four, by limiting Sarah E. McGehee to a life estate and remainder to John Scott McGehee, second son of Sarah E. McGehee.

There seems to be no room to doubt that during the ten years from January, 1870, date of the will, to May, 1880, date of codicil No. 4, this home was regarded and thought of by testatrix as one property—Hollywood house and section 32, on which it stands, and the furniture to go with it. In the same codicil, by which she revoked the provision for a monument over her grave, preferring, as she then said, that whatever could be saved out of the wreck of her estate should go to her heirs, she willed Hollywood house, furniture and section 32, on which it stands, to her sister. She preferred that her grave remain without a monument, that her heirs might have a little more; but the same mind and the same hand then and there refused to dismember the old homestead, where M. G. Dandridge had lived, where the family cemetery is, but directed it to go—Hollywood house, furniture and land (section 32), on which the house stands—to her sister, and later to her nephew, John Scott McGehee. The last codicil seems to have been made only because of a certain debt that must be paid. She therefore revoked a number of bequests to servants and kinspeople, amounting to a large sum, including a life policy for \$1,000 willed to

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a kinswoman. The testatrix, evidently a lady of a high sense of honor and of the sacredness of obligations, revoked her bequests that the debt might be paid instead of them; evidently with intent to save the home intact. Else she would have allowed the debt to be a charge on her general estate, and all the legatees and devisees share alike in its payment. She seemed to regret the necessity when she put in that revoking codicil the pathetic expression, "even the life insurance policy must go to a debt created last summer to W. T. McGehee;" which is equivalent to saying, "even to that extent I revoke my bequests and codicils." Had she intended to revoke the codicils about the homestead, would she not have said something showing severer regret? Or must we believe she was more attached to the life policy than to her home, Hollywood house and section 32, where she had lived for over thirty years, and lands belonging to it, containing the family cemetery, and which she had carefully kept intact in four separate acts of devise, and express no sorrow at dismembering it? "I hereby revoke all codicils and bequests save my dwelling house and furniture belonging to the same," says the last codicil.

Codicil No. 3 deals only with the Hollywood house and furniture and section 32, except to revoke the provision for a monument; and codicil four deals only with the house and lands. The word "save" takes out of the revocation some codicils or codicil, and those are the ones that dispose of her dwelling house and its furniture. They are saved. They are saved from the sweep of the revoking codicil, as counsel rightly claims, and those codicils devise section 32 and the dwelling—in other words, Hollywood house and section 32. It was not needed to pay the debt, for no demand has been made upon it for that purpose. It is suggested that this revoking codicil is obscure. If so, that only strengthens the contention of appellee. It makes no grant, but overturns and destroys former grants unequivocally made; and it cannot invade the will beyond what was clearly intended by the testatrix. Jarman on Wills (6th

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ed.), p. 179, sec. 19; *Gelbke v. Gelbke*, 88 Ala., 427 (6 South., 834); *Appeal of Reichards*, 116 Pa. St., 232 (9 Atl., 311); *University v. Pinckney*, 55 Md., 365-380, and cases there cited. This last case was exhaustively argued, and decided with great care, and it is there said: "In determining the question of revocation of a will by a codicil, all the cases agree: (3) Where the devise or bequest in the will is clear and free from doubt, the intention to revoke by the codicil must be equally clear and explicit," citing many authorities.

It seems to be, from a careful consideration of this will and codicils together, a fair and reasonable construction of the intention of the testatrix that codicils Nos. 3 and 4 should remain in force. They are not so inconsistent as to be unable to stand together with the last codicil. The clear and unmistakable intention of the testatrix, manifested and expressed in codicils Nos. 3 and 4, is not necessarily revoked by the last codicil, which is not as clear and explicit as are Nos. 3 and 4. Had the testatrix intended to take from Hollywood house section 32, surely she would have left some land with it, and not left a farmhouse in the country without lands. This view is strengthened by the fact, shown by the proof, that the estate was settled up with Sarah E. McGehee in possession of Hollywood, including section 32, claiming it as her own, and no objection was made until 1895, seven years after the death of testatrix; and W. E. McGehee, one of the heirs, testifies, against his own interests, that he heard Mrs. Dandridge say, a few years before her death, that she wanted Hollywood place to go to Sarah E. McGehee for life, and then to John S. McGehee, and that the possession of Hollywood place (house and section 32) by Sarah E. McGehee was continuous and notorious from January, 1888, to that time, February 14, 1896.

The decree of the court below is affirmed.

Brief for appellee.

FRANK PIERCE v. M. R. WATKINS, TRUSTEE.

1. ATTACHMENT. *Rent. Claimant. Notice. Code 1880, § 1318; Code 1892, § 2533.*

A claimant of goods attached for rent is to be treated, on the interposition of his claim, as a plaintiff in replevin, and should give due attention to the prosecution of his suit, without notification thereunto.

2. SAME. *Case.*

When his claim of goods attached for rent has been determined adversely to a claimant by a justice of the peace who was without jurisdiction, and, in consequence of his successful appeal to the circuit court, the papers are sent back and transferred for trial to a justice having jurisdiction, he is not entitled to be notified of the transfer.

FROM the circuit court of Newton county.

HON. A. G. MAYERS, Judge.

The judgment appealed from was rendered in a proceeding by certiorari to set aside the judgment of a justice of the peace. The opinion sufficiently states the case.

A. M. Byrd, J. M. Gage, and Geo. C. Tann for the appellant.

The facts stated in the petition for the writ of certiorari do not disclose any errors of law. The case was properly transferred under § 2534, code 1892. The petitioner, as claimant of the goods attached in the justice's court, was plaintiff, and was not entitled to notice of the transfer of the case to the proper magistrate. *Parkhurst v. Dunlap*, 6 How., 577. Of course, the court will confine its attention to matters of record in considering an appeal from a judgment in a proceeding by certiorari. Code 1892, § 89.

S. B. Watts, for the appellee.

1. There is no provision of law for the transfer of cases from

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one justice of the peace to another, except § 2395, code 1892, which does not embrace a transfer like the one in question. Section 2534 has reference to § 2518, code 1892, and is no authority for such a transfer.

2. The appellee should have been notified that the case was in the court to which it was transferred, especially since the law provided for two justices of the peace in the district, and it is presumable that there were two. Code 1892, § 2392. He was without notice of any kind of the time and place of trial.

COOPER, C. J., delivered the opinion of the court.

The appellee, a third person, claiming to be the owner of certain goods seized under an attachment for rent, interposed a claim therefor under the provisions of the code of 1880. He was therefore to be treated as a plaintiff in replevin. Code, 1880, § 1318; Code 1892, § 2533. As such plaintiff, it was his duty to prosecute his suit; to take notice of the return of the papers to the proper court, and of all steps thereafter taken in the cause. We know no statute which requires process to be issued to him, the plaintiff in the suit, upon the transfer of the papers from the court to which they were improperly returned to the proper court. The record shows that from a judgment against him, rendered, as he successfully contended, by the wrong justice, he prosecuted an appeal to the circuit court. He now contends that, upon the return of the papers from the circuit court to the justice of the peace, he was entitled to notice of the transfer to the proper officer, and that this notice, the record must affirmatively show, was given to him. It is not pretended that the cause was not transferred to and tried by the proper officer; the sole contention is that the judgment was void because no process was shown to have been issued to him. The court below should have quashed the writ and awarded a procedendo to the justice of the peace to execute the judgment he had entered.

The judgment of the court below is reversed and judgment will be entered here as above indicated.

Brief for appellant.

BOARD OF LEVEE COMMISSIONERS v. G. WIBORN.

EMINENT DOMAIN. *Laws of 1884, p. 166. Mortgagee.*

Whether a mortgagee be, or be not, a proper party to a condemnation proceeding, a payment by the levee board, with full knowledge of the mortgage, to the mortgagor of the damages awarded, will not, under laws 1884, p. 166, preclude a suit therefor by the mortgagee.

FROM the chancery court of Washington county.

HON. A. H. LONGINO, Chancellor.

In 1892, G. W. Smith owned lands near the Mississippi river, in Washington county, upon which appellant held a mortgage to secure a large sum of money. On the ninth day of April, of said year, the board of Mississippi levee commissioners instituted proceedings to condemn a part of said lands, under the act of 1884 (*Laws 1884, p. 166*), for levee purposes, but appellant was not made a party to the proceeding. There was awarded \$1,301.60 as damages. The award recited: "To the mortgagee, G. Wiborn, we award nothing, as his security for his debt is ample." The award was paid to Smith, the mortgagor. Wiborn's security, contrary to the recital of the award, proved insufficient to pay his debt by a sum in excess of the amount of the award, and he instituted this suit against appellant to compel it to respond to him for the sum of the damages assessed. Appellant's demurrer to the bill was overruled by the court below, and it appealed to this court.

Walter Sillers, for appellant.

In view of the fact that the rule in our court is that the mortgagor is the owner of the mortgaged property until after foreclosure, and that the mortgagee has only a lien on the prop-

Brief for appellee.

erty mortgaged, we see no reason for making the mortgagee a party to the condemnation proceedings. But if the mortgagee was a proper party, and was not made so, his remedy is still open to him. He can summon the commissioners and have the land condemned. If he has no right to institute proceedings before the commissioners to assess levee damages, he has no right to have the award applied to his debt, unless he had proceeded before the award was paid over. If the mortgagor was not entitled to have the condemnation proceedings, such proceedings were void, and Wiborn should have treated same as a nullity and proceeded before the commissioners for reassessment of damages. In neither event can he maintain this suit.

E. N. Thomas, for appellee.

It was the duty of the treasurer of the levee board, when the award was signed and delivered to him, showing on its face, as it did, that there were conflicting claims to the amount of said award, to pay the amount to the chancery clerk of the county, and to cause the award and receipt of clerk to be recorded. *Laws 1884*, pp. 166, 167. The payment of the amount awarded should have been made to the mortgagee, G. Wiborn, and not to the mortgagor, C. H. Smith. *Mills on Eminent Domain*, p. 74, states: "A statute requiring notice to occupants or owners would require notice to a mortgagee, especially if his mortgage was of record, and the doctrine of New York, which is supported by the best logic, is that the damage should be paid to the mortgagee, because his security is depreciated, and the damage, when paid, go in solution of the debt." But it is said our remedy was by appeal to the circuit court. We had no notice of the condemnation proceedings; we had no notice of the signing and delivery of the award, nor of the payment of the amount awarded to C. H. Smith. We, therefore, were not parties to the proceedings. 66 Miss., 253; 68 *Ib.*, 26, 27; *Mills on Eminent Domain*, 96. Without being parties we could not appeal. But appellant did not give us

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opportunity to appeal. In two days after the award was signed and delivered it was paid Smith, and there could have been nothing to appeal.

COOPER, C. J., delivered the opinion of the court.

There is great conflict of decision upon the question whether a mortgagee out of possession, but whose mortgage is duly recorded, is an "owner" of the land, within the meaning of that word, when used in statutes authorizing the exercise of the power of eminent domain on notice to, and proceedings against, the "owner" of lands. In some states it is held that, while the mortgagee has only an incumbrance on the land as security for his debt, that security is valuable as property, often far exceeding the real interest of the mortgagor, and, therefore, such mortgagee should be regarded in law, as he is in substance, the owner of the property, under statutes authorizing third persons or the public to take the land. In others it is decided that the mortgagee, especially before forfeiture, has no estate in the land, but only a security for his debt, and therefore is not owner of the land. In these states it is reasoned that neither the character of the tribunal by which the award of compensation is made, nor its machinery, qualify it to discharge the duty of settling conflicting claims to the fund awarded; that one who accepts a mortgage upon land, does so with notice of the fact that the property may be subjected to public uses, and upon payment to the mortgagor. It is, however, held in all the states, that the fund, when awarded, stands so far in the place of the land taken, that the mortgagee may, by seasonably proceeding, arrest its payment to the mortgagor, and secure its application to the mortgage debt.

We are not called upon by the facts of this case to determine whether, upon proceedings to condemn lands under statutes providing only that payment shall be made to the "owner" of the land, a mortgagee is or is not a necessary party. The act under which the condemnation now under investigation was

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made (Acts of 1884, p. 166), provided that: "In event that the owner or owners of said land, material or other property are unknown, or the said commissioners of damages are uncertain who they are, or there are conflicting claims to the amount of said award, or part thereof, then said levee treasurer may pay the same to the chancery court clerk of the proper county for such person as it may properly belong to," etc.

The report of the commissioners showing what sums were awarded to the mortgagor, and to his tenants who had crops growing on the land, states that: "To the mortgagee, G. Wiborn, we award nothing, as his security is ample." This statement that the security held by the mortgagee was ample, seems to have been not true, for upon sale of the mortgaged property there remained a balance due of something like \$20,000 over and above the sum realized at such sale.

The levee commissioner, by the very return of the award, had knowledge of the fact that there was a mortgage upon the land appropriated, due to the appellee; the statute under which the proceedings were had empowered the treasurer, as the officer of the board, to deposit the sum awarded in the hands of the chancery clerk, and thus to discharge the debt due by the board. In the face of this knowledge, and with full power to protect all parties in interest, he elected to pay the sum awarded to the mortgagor; and the single question is whether, under these circumstances, such payment can be interposed as a bar to the demand of the mortgagee. We think such payment does not preclude a recovery by the mortgagee, and, that whether he was or was not a necessary party to the proceedings, the statute manifestly contemplated just and equitable action on the part of the officers of the board in the payment of awards, and the provision that in cases of doubt the money might be paid over to the clerk of the chancery court was intended not only to protect the board from the danger of being required to pay twice for the same land, but to preserve to parties having claims upon the fund the opportunity of asserting their rights by proper

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judicial proceedings. The fund in the hands of the treasurer was, by necessary implication, made to stand for the land, in reference, at least, to conflicting claims known by him to exist. As to such funds he stood in the relation of a mere stakeholder, and, if he was guilty of the folly of assuming to determine to whom it should be paid, the consequence of a mistake must fall upon the board whose officer he was, rather than upon an innocent third person entitled to the fund, and of whose rights the board, through its agent, had full notice.

The decree is affirmed.

L. C. SMITH v. T. S. McWHORTER ET AL.

TENANTS IN COMMON. *Purchase by one. Innocent party.*

A tenant in common who purchases the joint estate under a deed of trust will hold the same as trustee for all the tenants; but adult co-tenants, with knowledge or sufficient information to charge them with knowledge, must elect within a reasonable time, to hold the purchaser as a trustee, otherwise, those who acquire rights in the property from him in good faith will be protected.

FROM the chancery court of Lauderdale county.

HON. W. T. HOUSTON, Chancellor.

Mrs. E. N. McWhorter died in 1893 owning, subject to the deed of trust next herein mentioned, the lands in controversy. In 1892 Mrs. McWhorter and her husband executed a deed of trust on the lands to secure a debt due to Chiles & Walker. A sale was made under the deed in November, 1893, after Mrs. McWhorter's death, and the lands were purchased by Mona McWhorter, one of the heirs of the decedent, she and her co-heirs residing at the time on the land.

Afterwards, Mona McWhorter and D. O. McWhorter, the husband, and an heir of the decedent, executed a deed of trust to L. C. Smith. D. O. McWhorter, the husband, died in

74	400
81	228

74	400
90	766

Brief for appellees.

1894. In February, 1895, the lands were sold under the deed of trust to Smith, and were purchased by him. The day before this sale the bill in this case was filed by the heirs of Mrs. McWhorter other than Mona McWhorter (and they were the heirs with said Mona, of D. O. McWhorter, deceased, as well), and one of them was an infant at the time, seeking partition of the lands. The defendants were Mona McWhorter, L. C. Smith, and the trustee in Smith's deed of trust.

J. P. Walker, for appellant.

Smith is a subsequent, remote, and innocent purchaser without notice, for a valuable consideration. The title was in Mona McWhorter, and if there was a trust it was undisclosed. *Clark v. Rainey*, 72 Miss., 157; *Hill on Trustees*, 509; 27 Am. & Eng. Enc. L., 264, 265, note; *Lawson's Rights & Remedies*, vol. 4, p. 3381; *Pomeroy's Eq. Juris.*, vol. 2, sec. 767 and sec. 770. Smith was not at the sale at which Mona McWhorter purchased. He knew nothing about it, except what the records showed. There is nothing in the testimony to show that anything ever came to his knowledge to put him on inquiry.

If complainants, or any of them, ever had any right to avail themselves of Mona McWhorter's purchase, that right is lost by lapse of years and by reason of interests acquired by innocent third parties. *Burr v. Muller*, 65 Ill., 258; 11 Am. & Eng. Enc. L., 1082; *Wood v. Augustine*, 61 Mo., 46; 26 Am. & Eng. Enc. L., 934. But, even if complainants, or any of them, have any interest in the land in controversy, the bill they exhibit does not entitle them to any relief. They do not offer to contribute their part of the purchase money paid by Mona McWhorter. They must offer to do equity before they can have relief.

Miller & Baskin, for appellees.

Mona McWhorter, being a tenant in common with complainants, could not buy in an outstanding title or incumbrance so

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as to defeat the complainants of their rights. *Knolls v. Barnhart et al.*, 71 N. Y., p. 474. But it is seriously contended in the answer that, even if the defendant, L. C. Smith, is not the owner of the property herein claimed by him, yet, it would be inequitable for these complainants to claim said property because of some presumed doctrine of estoppel based upon the idea that supplies were obtained by Mona McWhorter from Smith. We cannot understand how this can be contended, in view of the decision of *Brantley v. Wolf*, 60 Miss., 420, where it is definitely determined that, before an infant can be estopped by conduct, it must be shown that he was old enough and cunning enough to contrive and carry out a fraud, and there is no pretense that the complainants in anywise ever contributed in the least towards imposing upon the defendant, Smith, or anyone else. Smith knew that complainants, and defendant, Mona McWhorter, were tenants in common of said property, and that, therefore, Mona McWhorter could not buy in an outstanding title as against complainants herein.

Argued orally by *J. P. Walker*, for appellant.

COOPER, C. J., delivered the opinion of the court.

By reason of her connection with the appellees as tenants in common of the lands sought to be divided, Miss Mona McWhorter ought not, under the circumstances disclosed, to be permitted to hold title to the land under her purchase at the trustee's sale. But the appellees are, in our opinion, precluded from asserting their rights as against the appellant, Smith. That he was a *bona fide* incumbrancer of the land, at the time the bill was exhibited seems clear. It was exhibited the day before the sale under the deed of trust was advertised to be made, and though no reference to the incumbrance is made in the bill, which purports to be one for partition only, it is evident that its principal object was to test the validity of the security held by Smith. As he had at that date no interest in

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the land other than that of an incumbrancer, it cannot be doubted that he was made a party in order that the question might be settled whether his security bound any other share in the land than that of Mona McWhorter. We fail to perceive any evidence supporting the contention of appellees that the deed of trust to Chiles & Walker, at the sale under which Mona McWhorter became the purchaser, had been paid before the sale. On the contrary, we think it manifest that payment was designedly not made, in order that the sale might occur and the land be purchased by Mona McWhorter.

If the appellees, who were then of age, were not consulted in reference to the arrangement, they were chargeable with notice of what had been done, and reasonable inquiry would have disclosed the manner in which Mona was dealing with the land. She was not a trustee for the appellees, unless they should elect so to deal with her; and, if they desired and intended to claim that she was, it devolved upon them to act within a reasonable time, and before the rights of innocent third persons, induced to deal with her by her apparent ownership of the land, had intervened. Perry on Trusts, secs. 166, 218, 219, 829. No appeal has been prosecuted from the decree of the court below by any of the defendants, except Smith. We are, therefore, not concerned with the question whether any of the appellees are precluded from now fixing upon Mona McWhorter the character of trustee. As to Smith, none of the appellees is entitled to the land discharged of the incumbrances he holds. As he had not secured the legal title to the land when the bill was exhibited, his rights are to be tested by the condition of things then existing. The court should have required the petitioners to pay to Smith the sum for which he held a lien upon the land as the condition on which partition would be awarded, and, if that should not be done within a reasonable time, should have dismissed the petition. Upon the return of the cause to the court below, such decree should yet be made.

The decree is reversed.

Statement of the case.

J. F. AMES ET AL. v. B. G. WILLIAMS ET AL.

1. GUARDIAN AND WARD. *Accounting. Bond.*

A guardian and his sureties are accountable not only for money collected by him, but also for money which he might and could have collected by proper diligence.

2. SAME. *Delivery of assets to successor. Estoppel.*

When a guardian neglects to collect a solvent note due him as such, and delivers the same to his successor, his wards, in contesting his account, are not estopped from charging him and his sureties as if he had actually collected the money due on the note, with interest, by the fact that they had reduced the note to judgment against the maker, even where the guardian is himself the maker of the note, credit being given, however, for what was realized by the suit.

FROM the chancery court of Noxubee county.

HON. T. B. GRAHAM, Chancellor.

Robert C. Patty, deceased, was guardian of the appellees, and as such came into possession, among other assets, of a note for \$2,200, executed by himself, payable to the ancestor of his wards, and which was secured by deed in trust on lands. Patty never accounted for any part of this note. After Patty's death his administratrix, in 1891, filed a final account of his guardianship, and delivered the \$2,200 note, and the deed of trust securing it, to the succeeding guardian of the appellees. In 1892 the appellees instituted a suit to enforce the lien of the deed in trust securing said note, and for a personal decree against Patty's administratrix for any balance that might remain after sale of the property. This suit proceeded to a final decree, which adjudged the sum due on the note, with simple interest to date of decree, April, 1893, at \$2,941.44. During the pendency of said suit the appellees filed exceptions to the final account of Patty's guardianship, presented by his administra-

Statement of the case.

trix, specifying, among many other exceptions, the failure to charge Patty with the \$2,200 note, with interest, etc. After the final decree in the foreclosure suit, and pending the exceptions to the final account of Patty's guardianship, the appellees began the present suit upon Patty's bond as guardian, and the present suit has three times before been in the supreme court, and is three times reported: *Patty v. Williams*, 71 Miss., 837; *Ames v. Williams*, 72 Miss., 760, and *Ames v. Williams*, 73 Miss., 772.

In April, 1894, this case and the suit involving the exceptions to Patty's final account of the guardianship were, for purposes of hearing, consolidated, as each involved an investigation of the amount due to appellees. Before a final decree in the consolidated causes, the appellees instituted and conducted to a successful conclusion still another suit against the widow and administratrix of Patty, based in part upon their ownership of the decree in the foreclosure suit, and they succeeded in vacating as fraudulent a conveyance of lands made by Patty to his wife, and obtained a decree ordering the lands to be sold to pay them \$1,797.90—the balance of said decree after sale of the lands in the deed of trust.

At the hearing of the consolidated suits, from the decree in which the present appeal is prosecuted, it was shown that the \$2,200 note was good, and could have been collected at the time Patty became guardian and received the note as such. The proceedings and decrees in all the suits above mentioned were offered in evidence, and the appellants contended that the appellees were estopped thereby from claiming any greater sum as due on account of said note, than that which was adjudged to be due on it in the foreclosure suit and in the suit to vacate the fraudulent conveyance. The court below did not take this view, but decreed liability as if Patty had collected the note in his lifetime, and interest was calculated with annual rests. The foregoing statement contains all the facts deemed necessary to be stated, in view of the opinion of the court.

Brief for appellees.

C. B. Ames, for appellants.

When Patty was appointed guardian of appellees, he owed a note payable to their father, which was then due. This note was never paid by Patty. After his death there were two inconsistent courses left open to them with regard to this note. The one was to accept the note as assets coming into their hands; the other was to regard that as done which should have been done, and treat the note as having been collected by Patty, thereby charging him on his bond with the proceeds thereof. These two courses were utterly inconsistent with each other. The one was to treat the note as paid; the other was to regard the note and trust deed, securing it, as still in existence and unsatisfied. They elected the latter remedy. On two separate occasions they came into the chancery court and procured relief solely upon the ground that this note and trust deed was still outstanding assets in their hands and unsatisfied.

After having exhausted their rights upon that theory of the case, they now come into court and ask for further relief, based upon a wholly inconsistent theory of the case. Having exhausted the power of the court to aid them, because of the existence of the note and trust deed, they now come into the very same court and seek relief because of the nonexistence of the very same note and trust deed.

They do not even have the grace to ask for damages for failure on the part of Patty to collect the note. On the contrary, the relief they now claim is wholly inconsistent with a prayer for damages, because it presupposes the collection of the note at the time of Patty's appointment. In this proceeding they do not admit the noncollection of the note, and hence they do not ask for damages, and could not. The theory of their case now is, that the note was collected, and hence it is utterly at variance with a claim for damages for failure to collect.

J. E. Rives, for appellees.

It is contended that appellees are estopped from asserting

Brief for appellees.

any claim in this proceeding against Patty and his bondsmen, for the reason that since Patty's death two suits were begun on this note, and something was realized thereon; that having accepted the note, and obtained decrees for the amount thereon, we are precluded from having Patty charged on his bond for this money as having been collected by him. The evidence adduced by appellants, in support of this position, are the records in those two cases, one of which was a proceeding to foreclose the trust deed which Patty had given to secure the note, and the other was a proceeding to subject certain other property to the payment of the note.

In the first place, the parties to those proceedings and in this proceeding are not the same. In the first of those cases, the Williams heirs sought, by their bill, to foreclose a trust deed given by Patty individually, to secure his individual note which became the property of his wards. Patty, as guardian, having failed to collect the note, his wards, after his death, took the same proceedings to collect it as they would have had to take in case the note had been due and owing by some one else. It was not brought against him in his official capacity as guardian. The total amount that could have been collected from him in his individual capacity was the face of the note and simple interest, just what we could have collected from anyone else on any note they might be owing.

The other suit was brought to subject the value of the homestead (over \$2,000) to the payment of what was due these wards, and in the bill in that case it was expressly stated that we claimed not only the amount of this note, but whatever might be realized upon the exceptions in this case. That was not between the same parties.

In the next place, in order to hold the position of appellants as sound, it would be necessary to hold that in a case where a guardian has neglected his duty by failing to collect an indebtedness due his ward, and turns over the evidence of that indebtedness to the succeeding guardian, that succeeding guardian

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cannot collect from the debtor the amount owing by him and then proceed against the defaulting guardian for any loss sustained by reason of his neglect of duty. Besides that, the decree of the chancellor requires Patty to be credited with whatever sums which have been realized from those suits, or any other source, and only holds him liable for the loss occasioned for the failure, on his part, to perform his duty.

To show the fallacy of their position, let us suppose that this note was not Patty's individual note, but a note given by A B. Would a suit against A B to collect what was due on the note be a bar to a suit against Patty on his bond as guardian for what he, as guardian, would be liable for on account of his neglect of duty? He and his bondsmen would undoubtedly be liable for the whole amount of the note to the same extent as if he had collected it when due, and the suits against the maker of the note, so far from being a bar to such action, and so far from being a ground of objection, are, in reality, for the benefit of the bondsmen. Certainly they could not be heard to complain.

WOODS, J., delivered the opinion of the court.

The opinion of this court on the former appeal in this case (*Ames v. Williams*, 73 Miss., 772), substantially disposes of the third and fourth assignments of error in the present appeal. These assignments are, in brief, that the chancery court erred in making annual rests, in stating the account of Patty's administratrix, and in compounding interest, and in not allowing expenditures in excess of income collected during any one year.

Now, both assignments are clearly held by us to be without merit in the former opinion dismissing the other appeal. It was declared by us, that if, as is suggested, the guardian exceeded the income of the ward, the fact that a part of that income consisted of compound interest, even if that interest should not have been charged, would result in discharging the guardian

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from liability therefor, for certainly, under our statute, no expenditure above the income could be allowed, and the commissioner is directed to allow all proper expenditures to an amount equal to the income, of whatever it is composed." This leaves no ground for contention, as to these assignments, on the present appeal.

The first and second assignments of error may be conveniently and properly considered together. By the first assignment it is alleged that the court below erred in sustaining the second exception to the final account of R. C. Patty's guardianship, and, by the second assignment, error is predicated of the court's action in directing the amount due on the note for \$2,200, made by Patty to A. M. Williams, to be charged against Patty, guardian, as having been collected by him. The second exception to the final account of Patty's guardianship raises this same question of charging Patty with the balance due on the \$2,200 note.

That this note came into the guardian's hands as such, that its maker was solvent, and that it could have been collected during Patty's lifetime, had he made any effort to do so, is not disputable. We are at a loss to see why the appellants should not be held liable to account to Patty's wards for the uncollected balance of the note. They are equally liable for money which actually came into the guardian's hands and for that which could and should have been collected by a faithful discharge of his duties by the guardian. The mere fact that the present guardian has resorted to a security given with the note to make its payment more certain, and the further fact that he has actually realized some part of the balance due on the note, by such resort, cannot and does not absolve from liability these sureties who have bound themselves for the faithful performance of his duties by the guardian, when it is shown that the guardian was derelict in not attempting to collect, as should have been done, a perfectly solvent credit until it had become worthless. If their principal had actually reduced the \$2,200

Syllabus.

to possession, his sureties would be liable, if not properly accounted for; and, if not actually reduced to possession when it was the guardian's plain duty to do so, and when that might have been done, then, too, the sureties must respond. See *Mc Williams v. Norfleet*, 63 Miss., 183, and cases therein cited. It is impossible to conceive of any other rule than that of holding the guardian and his sureties liable for losses sustained by the ward by reason of the guardian's neglect, by timely action, to collect as it was his duty to do.

Affirmed.

74	410
91	273

YAZOO & MISSISSIPPI VALLEY RAILROAD CO. v. T. L.
WHITTINGTON.

1. RAILROADS. *Live stock near track. Duty of engineer, etc.*

It is not the duty of the engineer of a railroad train, upon seeing live stock near the track, to stop the train or check its speed, unless there is an apparent necessity for so doing, and, ordinarily, the discovery of an animal near the track does not create such necessity.

2. SAME.

An engineer is not bound to anticipate that a horse drinking at a pond would run up a bank ten or twelve feet high, in front of a moving train.

FROM the circuit court of Jefferson county.

HON. W. P. CASSEDY, Judge.

The facts are stated in the opinion of the court.

Mayes & Harris, for appellant.

C. S. Coffey, for the appellee.

The reporter does not find a brief on either side on file.

Opinion of the court.

STOCKDALE, J., delivered the opinion of the court.

T. L. Whittington recovered judgment against appellant (defendant below) at the August term, A.D. 1895, for sixty dollars and costs of suit—price of a horse killed by appellant's train—and this appeal was prayed and allowed.

On the trial, S. J. Jones, witness for plaintiff, testified that he saw the horse killed. The horse was drinking from a pond about twelve feet from the railroad track when witness first saw him. He heard the train, threw up his head, and jumped upon the track, turned down it, ran in front of the engine about thirty yards, was knocked off and killed. The train went on about sixty yards and stopped or checked up. The witnesses practically agree that the train was about coming out, or had just come out, of a cut about forty or fifty yards north of the pond where the horse was drinking and the place where he ran up on the track, the embankment being ten or twelve feet high there, and that the distance from where the horse jumped upon the track to where he was killed was estimated to be twenty to thirty yards.

Several witnesses testified that the engineer might have seen the horse where he was drinking at the pond, three hundred to four hundred feet away, as he came down the road. The greatest estimated distance (except one witness) between where the engine was when the horse got upon the track, and where he was killed, was eighty yards. Some witnesses say less—forty-five or fifty yards. The engineer testified that the grade was slightly descending, and that he could not have stopped his train under three hundred to three hundred and fifty feet; that as soon as the horse got upon the track he put on brakes with full force, and cut off steam to lower the speed of the train, and blew the whistle. No effort was made, so far as the record shows, to controvert that testimony. Indeed, it seems not to be at all claimed that the train could have been stopped after the horse got upon the track before it struck him. And it may be conceded that the train could have been stopped between the

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point where the engineer might have observed the horse drinking at the pond and the point where the horse was killed, and yet not make the railroad company liable, for the engineer was not required to stop his train before the horse got upon the track. And as that testimony was before the jury, the verdict may have been, and probably was, based upon it; whereas, appellant was not liable unless its servants failed to use proper effort after the horse mounted the track. "It is not the duty of the engineer to stop his train until there is an apparent necessity for it. Ordinarily, the discovery of animals or persons near the road does not require the stopping of the train." *Railroad Co. v. Brunfield*, 64 Miss., 637; *Railroad Co. v. Thornton*, 65 Miss., 256. The engineer could not be held to anticipate that a horse drinking at a pond would run up a bank ten or twelve feet high right in front of a moving train.

It is not required that a train be stopped, nor its speed checked, because animals are discovered near the track; "unless appearances reasonably indicate danger of their going upon the track, neither the stoppage nor an effort to stop the train is required." Rapid movements and regular connections are among the chief advantages of transportation by railroads—this is a duty they owe to the public—and if a train must stop or check up whenever an animal is near the track, such duties could not be properly discharged. *Railroad Co. v. Bourgeois*, 66 Miss., 3.

So far as the evidence in this case discloses, appellant's servants used all reasonable efforts, and did all they could do, to avoid the accident and the killing of the horse after he started to get upon the track. True, Mr. Jones testified that, so far as he could see, no effort was made to check the train, but the same witness also testified that the train stopped, or checked up so that the train master got off, in about sixty yards after the horse was struck, therefore the engineer must have used his appliances to check the train about the time and place he and the fireman testified to.

We are of opinion that, upon the testimony as detailed on

Brief for appellees.

the trial, as shown in this record, the peremptory instruction should have been given, and therefore the motion for a new trial ought to have been sustained.

The judgment of the court below is reversed, and new trial granted, and the cause remanded.

W. C. MOORE, USE, ETC., v. LOWREY, CARTER & CO. ET AL.

1. ATTACHMENT LEVY. *Indemnifying bond. Damages.*

Attorneys' fees, and other expenses incurred in sustaining a claimant's issue for property seized under attachment, are not ordinarily recoverable in a suit on an indemnifying bond.

2. SAME. *Wilful wrong.*

Knowledge by a plaintiff in attachment, and of his attorney, that a bill of sale to personal property has been executed by the defendant in execution and duly recorded, does not make a levy thereon a wilful wrong.

FROM the circuit court of Jones county.

HON. A. G. MAYERS, Judge.

The suit was instituted by Moore, sheriff, for the use of Gage, against appellees to recover damages on an indemnifying bond. A demurrer was sustained to the declaration, and plaintiff appealed.

F. V. Braham, for appellant.

The declaration is good in law, and the demurrer should have been overruled. See §§ 3482 and 3483 of the code of 1892. See, also, 24 Miss., 96; 25 *Ib.*, 369; 58 *Ib.*, 298; 50 *Ib.*, 320, 387; 54 *Ib.*, 702; 64 *Ib.*, 236; 66 *Ib.*, 471; 67 *Ib.*, 494; 68 *Ib.*, 180, 573.

McIntosh & McIntosh, for appellees.

Evidently the counsel for appellant has been misled by the

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syllabus and statement of the case in *Brinker v. Leinkauff et al.*, 64 Miss., 236. In that case, the opinion of the court, delivered by Cooper, C. J., does not squint at the radical principle announced in the syllabus. It holds that the demurrer was properly sustained, and that the damages for which the obligors in the bond could be held liable, "were such as should result from the seizure of the goods, and did not include attorneys' fees nor other expenses incurred by the appellant in defending his title to the property" (citing *Stauffer v. Garrison*, 61 Miss., 67).

CALHOON, Sp. J., delivered the opinion of the court.

Mr. Gage filed a declaration in the name of Moore, sheriff, on an indemnifying bond, averring that he owned \$2,000 worth of lumber stored with a lumber company; that Lowrey, Carter & Co. attached a debtor and seized his lumber, but was required to give, and did give, to the sheriff the indemnifying bond sued on; that he, as claimant, replevied this lumber and gave the proper replevin bond, and was successful on the trial of the claimant's issue; that the attached debtor had, long before the suing out of the attachment, sold him the lumber by bill of sale, which was recorded in the chattel deed records of the county, and that the attaching creditors well knew, or, by due diligence could have known, of this record, and, because of this knowledge, the seizure of his property was a wilful wrong on him. He claims damages for attorneys' fees and other charges incurred by him in defending his claim, to the amount of \$1,200. The condition of the bond sued on is, according to the statute, to save the sheriff harmless "against all damages which he may sustain in consequence of the seizure or sale of said property." A demurrer was sustained to this declaration.

This court is thoroughly committed to the doctrine that attorneys' fees and expenses incurred in sustaining the issue, such as hotel bills, traveling expenses, telegrams, etc., are not re-

Syllabus.

coverable in actions on such bonds as that sued on here. *Brinker v. Lainkauff*, 64 Miss., 239, 240; *Stauffer v. Garrison*, 61 Miss., 70, 71; *Smokey v. Peters*, 66 Miss., 475.

We are not called on to decide anything in reference to what, if any, would be the legal result in this action if the seizure involved questions of wilful wrong or fraud, malice or oppression, because there is no averment of any facts showing either. Neither is shown by the charge that the plaintiffs in the attachment "and their attorney of record well knew of the execution and record of said bill of sale, or could have known, by due diligence, . . . and plaintiffs allege that, in view of this knowledge, the suing out of said attachment and the seizure of said lumber was a wilful wrong." This is a *non sequitur*. The very record of the bill of sale may have been an inducement to the procedure of levy in the utmost good faith and honesty of belief. The court below properly sustained the demurrer and the judgment is

Affirmed.

J. N. BARWICK v. I. MOYSE & SONS.

1. MORTGAGE. *Foreclosure. Defense.*

In a suit to foreclose a mortgage, if the mortgagee makes out a *prima facie* case not disclosing fraud, the mortgagor cannot successfully defend by showing that the deed was executed to defraud his creditors, and that the mortgagee was a party to the fraud.

2. FRAUDULENT CONVEYANCE *Good between parties.*

Though a mortgage be executed with intent to defraud the creditors of the mortgagor, it is nevertheless good between the parties.

FROM the chancery court of Amite county.

HON. CLAUDE PINTARD, Chancellor.

The facts are stated in the opinion of the court.

Brief for appellant.

Theodore McKnight, for appellant.

The test of the character of the transaction in giving the note and recording the deed for more than the true amount, admitting the \$620.52 to be the true amount due Moyse, is, was it such as would have been held as fraudulent as against the creditor of Barwick, had such creditor attacked the same for fraud therein. If so, then the act is of such a character that a court of equity should leave the parties thereto where it finds them. *Watson v. Tusten*, 49 Miss., 576, and 8 Am. & Eng. Enc. L., 771, and authorities there cited. Fraud avoids, both at law and in equity, every contract, however solemn. W., 72; 5 H., 673; 1 Smed. & M., 443; 2 C., 504. Even judgments or decrees obtained by fraud will be set aside. 5 H., 365, 562; 3 Smed. & M., 695; 3 G., 180; 5 G., 101. A person innocent himself of fraud cannot hold property, or an advantage gained for him, by the fraud of another. *Planters' Bank v. Neely*, 7 H., 80.

"Fraud renders a contract voidable *ab initio*, both at law and in equity, whether such fraud were committed by one of the contracting parties upon the other; or by both upon persons not parties thereto; for the law will not sanction dishonest views and practices, by enabling an individual to acquire any right or interest by means thereof." Chitty on Contracts (11th ed.), p. 1035.

If Barwick had only owed Moyse one cent, and this were all that Moyse claimed, they would have had the same right, if they have any, to have taken Barwick's note for \$1,220.52, secured by deed in trust on his lands, in fraud of his creditors, as they had to do so for the sum of \$620.52. The principle is exactly the same, and to enforce either would be to "sanction dishonest practices." There is a vast distinction between a case where the consideration is merely fictitious, and not made for a fraudulent purpose, and one where fraud is the object in whole or in part to be accomplished by the execution of the conveyance. The first, in the absence of fraud, might be

Brief for appellees.

enforced, but the latter never, because of the fraud. Equity will not assist a party to a fraud. *Lawrence v. Hand*, 1 Cush., 103. Appellees did not come into equity "with clean hands."

Chas. E. Williams and *Will A. Parsons*, for appellees.

On the question of law in this case we submit that, where the complainant in a court of equity is able to make out his *prima facie* case without disclosing any fraud, on principle and authority, it is not competent for the defendant to set up his own fraud, though participated in by the complainant. Bigelow on Fraud, vol. 1, pp. 200, 206; *Harvey v. Varney*, 98 Mass., 118; *Dyer v. Homer*, 22 Pick., 253. In *Harvey v. Varney*, *supra*, the court says: "Defendants in equity cannot be allowed to prove that a stock of goods was transferred from one firm to another to hinder, delay, or defraud creditors. In an action to foreclose a mortgage made to defraud creditors, where the mortgagee can show a *prima facie* case without revealing the fraud in the transaction, the defendant will not be permitted to plead as a defense his own and the complainant's fraudulent intention, and that the mortgage was without consideration. Wiltsie on Mortgage Foreclosure, p. 429. The defendant in a proceeding to foreclose a mortgage cannot set up his own and the mortgagee's fraud in making the mortgage. *Bonesteel v. Sullivan*, 104 Pa. St., p. 9. In that case the court says: "The complainant stands apparently on a *bona fide* transaction, whilst the defendant, in the very first step in his defense, is obliged to exhibit his own fraud, hence he cannot gain the ear of the court." The same doctrine is held in *Williams v. Williams*, 10 Cas., 312; *Gill v. Henry*, 14 Nor., 388. A conveyance or transfer by way of mortgage in fraud of creditors is not regarded as *turpis causa*, which renders all contracts void. It is merely voidable only, in favor of the defrauded creditors, leaving it in all other respects, and as between the parties, valid, the fraud being available only to those injured by it. Beach on Modern Equity Jurisprudence, vol. 1, p. 471; *Delvin v. Quigg*, 20 Am. St.

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Rep., 592; *Livingston v. Ives*, 35 Minn., p. 55. The doctrine we contend for was recognized in the case of *Walker v. Brungard*, 13 Smed. & M., 723.

STOCKDALE, J., delivered the opinion of the court.

Appellees filed their bill in the chancery court of Amite county to foreclose and enforce a deed of trust given by appellant, on December 5, 1891, to J. M. Ellzey, trustee, for appellees, to secure a note of that date, payable December 1, 1892, for \$1,220.52. Said note bore a credit of \$600 from date, and the bill sought to collect the balance, \$620.52, and interest. Appellant (defendant below) answered said bill at the July term, 1895, of said court, and set up as defense thereto, after admitting that he executed the note and deed of trust described in the bill of complaint, that he owed appellees nothing, and the said note, and credit on it, and deed of trust, were fictitious and without consideration, and were both executed for the purpose of preventing Adler, Goldman & Co., of St. Louis, whom appellant owed a considerable sum, from seizing and selling his lands, and for no other purpose, and that the suggestion to do that came from Julius Moyse, one of complainants; that he has settled with Adler, Goldman & Co. satisfactorily; that he had been dealing with I. Moyse & Sons for several years, and no settlement was had between them on the fifth of December, 1891; that they had failed to give him credit for fourteen bales of cotton delivered November 2, 1889.

The answer was made a cross bill, with a prayer that the deed of trust be removed, as a cloud upon his title, and the note canceled. Appellees answered the cross bill, denying every allegation thereof as to fraud, and asserting that they had a full settlement with appellant on December 5, 1891, upon which he owed them \$620.52, and that he agreed to give his note for that amount, and secure it on lands, in consideration of extension; that, when appellees were having the deed of trust drawn up, appellant asked them to add \$600 and make

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the note \$1,220.52, and make the deed to correspond, and then give him credit on the note for \$600, which they did, to accommodate him, not knowing why he asked it, nor what was his object, and had no intimation of anything like fraud, or delay or hindrance of other creditors. Denied receiving the fourteen bales of cotton. They denied that the suggestion came from them about making the note \$1,220.52 instead of \$620.52. The bill and answer and cross bill, and complainants' answer to defendant's cross bill, are all sworn to. At the January term, 1896, the cause was set down for final hearing, and tried on May 7, 1896. The depositions of Julius Moysé were suppressed because he failed to appear and testify in open court upon notice to do so, and the chancellor heard the testimony on both sides in open court and went into a full investigation of the accounts and transactions between the parties, and took the matter under advisement, decree to be entered in vacation. The final decree was entered August 27, 1896. By this final decree the cross bill of defendant was denied and dismissed, and a decree rendered on the bill and answer and proofs, awarding relief to complainants, and that the sum of \$882.84 is due them from defendant, and that the land described in the deed be sold if the debt be not paid; and from that decree this appeal comes.

In view of the fact that the chancellor heard the witnesses testify, and considered the case deliberately, under advisement, we do not feel warranted in disturbing his findings on the facts, after a careful examination of the evidence. But counsel for appellant claims and urges that, even if the facts as to the indebtedness would justify a decree in favor of appellees, they were not entitled to a decree in equity, but their bill should have been dismissed; for it is apparent, he insists, that appellant and appellees were both intent upon delaying the collection of their debt by Adler, Goldman & Co. That proposition involves the correctness of the decree of the chancellor in dismissing the cross bill; for by the dismissal of the cross bill the alle-

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gations in reference to Adler, Goldman & Co. were eliminated from the controversy. And we will inquire into that action first, and then determine whether the authorities cited by counsel for appellant have a bearing on this case.

The contention of appellees' counsel is that complainants below having been able to make out a *prima facie* case without discovering any fraud, if there were any, and, the allegations of fraud being first brought into court by defendant, he cannot be heard to set it up in defense of complainants' *prima facie* case. That must have been the ground upon which the court below dismissed the cross bill, and proceeded to try the case as to the indebtedness between the parties. It is laid down (Bigelow on the Law of Frauds, p. 200 *et seq.*) as a general rule "that a party cannot set up his own fraud as a ground upon which to rest his action or defense." It is laid down as the law in Wiltsie on Mortgage Foreclosures, p. 429, that "in an action for foreclosure, where the mortgagee can show a *prima facie* right to recover on the face of the instrument, without revealing the fraud in the transaction, the defendant will not be permitted to plead as a defense his own and the plaintiff's fraudulent intention, and that the mortgage was without consideration."

In *Harvey v. Varney*, 98 Mass., 118, it is held that in that commonwealth "a long series of cases has established the rule that a transfer of either real or personal property, made with a view to defraud the creditors of the grantor, although the grantee has participated in this intent, is good between the parties, and void as against creditors only, or, to speak accurately, is voidable by creditors at their election." And this doctrine prevails as to executory contracts as well as to executed contracts, although entered into to prevent the creditors of the vendor from attaching the property. *Id.*, and cases referred to. A mortgage for more than the amount due, and a mortgage in fraud of creditors, are not regarded as *turpis causa*, which renders all contracts void. They are merely voidable in favor

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of creditors, leaving them, in all other respects, and as between the parties, valid. 1 Beach Mod. Eq. Jur., pp. 470, 471.

In *Bonesteel v. Sullivan*, 104 Pa. St., 9, the court said: "Sullivan could not set up his own fraud to defeat the mortgage. If it was given to hinder, delay, or defraud creditors, as seems to have been the fact, Bonesteel, whose case rested upon this mortgage, *prima facie* executed in good faith and for value, could recover." Though a participant in the fraud, he apparently stands on a *bona fide* transaction, while the latter, as the very first step in his defense, is obliged to exhibit his own fraud; hence he cannot gain the ear of the court. It follows that the mortgage in the case in hand is good between the parties. The same doctrine is announced in *Williams v. Williams*, 34 Pa. St., 312, and in *Walker v. Brungard*, 13 Smed. & M., 723. The appellees' case here described no fraud, and they were *prima facie* entitled to relief; and the court will not allow the defendant to introduce his own fraud into court, as his first step, and present it in a court of equity as an instrument to be used by a court of conscience to defeat a cause apparently without fraud. He cannot infuse his own fraud into a *prima facie* just cause, with his own hands, and then invoke the maxim of "clean hands" for his antagonist. The court will not lend its ear to the cry.

From the doctrines laid down in these cases above cited, and many others, it seems clear that the court below rightfully dismissed the cross bill, and denied the ear of the court to a defendant for the purpose of setting up his own fraud in his own defense, and tried the issue between the parties as to the indebtedness put in issue by the pleadings, and that even if the deed of trust was given by appellant to defraud his creditors, and appellees were aware of it and consented to it, the deed was good, as between the parties, for the amount due appellees, and could only be set aside at the instance of the defrauded creditors, if at all.

Appellant's counsel cites *Walton v. Tusten*, 49 Miss., 576,

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and 8 Am. & Eng. Enc. L., 771, but it is held in both that a fraudulent conveyance is good between the parties. The cases cited by him in proof that fraud will avoid every contract were prosecuted by injured creditors, and do not apply in this case. Counsel for appellant refers us to Chitty on Contracts (2d ed.), p. 1035, to show that fraud renders a contract voidable *ab initio*, both at law and equity—a principle that is not disputed; but the contract is voidable at the instance of an innocent party not a participant. In the same book, two pages further on, page 1037, it is laid down as follows: “It is not competent to the person who was guilty of the fraud, to avoid the contract on the ground thereof. So that where a contract is fraudulent, it may be valid as between the parties thereto, although void so far as it affects the rights of others.” The authorities are abundant and uniform on the line of those cited in this opinion.

The court below heard and saw the witnesses testify, and, upon full investigation and deliberation, found that the note secured by the deed of trust was a valid debt, and so decreed that it should be paid. We do not find in the record in this case sufficient grounds to induce this court to disturb the final decree. The decree of the court below is therefore

Affirmed.

WHITFIELD, J., specially concurring. I concur in the result reached, agreeing with the chancellor on the facts. I express no opinion on the other points.

Statement of the case.

MRS. J. C. FURR v. BENJAMIN F. SPEED.

1. SLANDER. *Words actionable per se. Poisoned.*

To charge the defendant with having poisoned the plaintiff is actionable *per se*.

2. SAME. *Peremptory instruction.*

If there be a conflict of evidence as to whether the words charged in an action for slander were spoken, it is proper to refuse a peremptory instruction for the plaintiff.

3. SAME. *Damages.*

It is not error, in an action for slander, to refuse plaintiff an instruction to the effect that proof of damage is unnecessary, when the same fails to state that the jury must believe that the slanderous words were spoken by defendant.

4. SAME. *Intention.*

Both intention to injure and damage are implied by law from the speaking of words which are slanderous *per se*.

5. SAME.

If the defendant is shown to have charged plaintiff with having poisoned him, an instruction that before plaintiff can recover, the jury must believe that defendant spoke the words with the intent to say that the plaintiff intentionally poisoned him, is erroneous.

6. SAME. *Proof.*

A recovery in an action for slander can be had only where the words charged, or synonymous words, are proved to have been spoken.

FROM the circuit court of Lincoln county.

HON. J. B. CHRISMAN, Judge.

The facts are sufficiently stated in the opinion of the court.

The seventh instruction, given at plaintiff's request, which is referred to, in the opinion of the court, is as follows:

"7. The court instructs the jury, for the plaintiff, that in an action for slander, the law implies damages from the speaking

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of the words which accuse the plaintiff of crime, and, also, that the defendant intended the injury which the slander was calculated to effect; and, in this case, if the jury believe, from the evidence, that the defendant is guilty, as charged in the declaration, then they are to determine, from all the facts and circumstances proved, what damages ought to be given, and the jury are not confined to the mere pecuniary loss or injury sustained."

The instructions given for defendant, referred to in the opinion of the court, are as follows:

"3. The court further instructs the jury, for the defendant, that unless they believe, from the evidence, that the defendant intended, by what he said, to charge the plaintiff with intentionally administering poison to him, with intent to kill and murder him, then they will find for defendant.

"4. The court instructs the jury, for the defendant, that if they believe, from the evidence in the case, that Speed did not intend to impute anything wrong to plaintiff, and that all Speed said was, that he believed he was poisoned in the coffee, and that he did not charge that Mrs. Furr put the poison in the coffee, or knew it was in the coffee when she gave it to him, then they will find for defendant.

"5. The court further instructs the jury, for the defendant, that before any recovery can be had in this case, the plaintiff must establish, by a preponderance of the evidence, that the defendant perpetrated the slander complained of in the declaration, and if, from all the evidence in the case, the jury are unable to determine whether he did say so or not, then they will find for defendant."

The other instructions are sufficiently stated in the opinion.

R. H. Thompson, for appellant.

The peremptory instruction asked by the plaintiff should have been given. This I predicate of the evidence of the defendant himself. Speed testified that, after dining at the plaintiff's table and leaving the premises, he said to several persons "that

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he believed that he had been poisoned, and that he believed the poison was in the coffee, and that Mrs. Furr, the plaintiff, gave him the coffee." This language, without explanation or qualification, is libelous *per se*. The natural import of these words, unexplained and unqualified, is to impute crime. If Speed was not willing for this implication to be received by his hearers, he would have added something to the effect that he did not think the good woman knowingly or intentionally poisoned him. This he did not do, and, it will be noted, in his evidence he nowhere states his belief to be that plaintiff was innocent in the matter. It will be seen from the authorities that the words averred in the declaration, and proved on the trial by plaintiff's witnesses, "Mrs. Furr poisoned me," are actionable *per se*. *Gardner v. Spurdant*, Cro. Jac., 438.

Townsend on Slander and Libel, sec. 168, says: "A general charge of being a murderer, or of having killed another, is actionable. Thus, held actionable to say, 'Thou hast killed a man,' 'You killed my brother,' 'You killed one negro and nearly killed another,' 'George Burton is the man who killed my husband,' 'I will call him in question for poisoning his own aunt, and make no doubt but to prove he hath poisoned his aunt,' " etc. Even had the words been "I believe Mrs. Furr poisoned me," they would have been actionable. See Starkie on Slander, vol. 1, pp. 68, 69, top p. 60, where the following words were held actionable: "A woman told me that she heard one say that Meggs, his wife, had poisoned Griffin, her first husband, in a mess of milk."

When Speed said "that he believed he had been poisoned, and that he believed that the poison was in the coffee, and that Mrs. Furr gave him the coffee," he substantially said, he surely left a legitimate inference, that "he believed Mrs. Furr poisoned him." To have so stated—to have used these words—would have made him liable. It is actionable for one to say that he supposes or thinks or believes another to be guilty of a crime. Townsend on Slander and Libel, sec. 163; Starkie on

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Slander, vol. 1, p. 64, top page 56; *Miller v. Miller*, 8 Johns. (N. Y.), 74; *Waters v. Jones*, 3 Port., 442 (29 Am. Dec., 261); *Giddens v. Mirk*, 4 Ga., 364; *Logan v. Steele*, 1 Bibb, 593, s.c. 4 Am. Dec., 669; *Nye v. Oatis*, 8 Mass., 121, s.c. 5 Am. Dec., 79.

The court surely erred in giving the instructions which were granted at defendant's request. Read the first one. It says to the jury that, before the plaintiff can recover, they must be satisfied from the evidence not only that defendant had spoken the words "Mrs. Furr poisoned me," but that the words were so spoken with the intent, and that defendant meant thereby to say that Mrs. Furr intentionally poisoned him, and was guilty of an attempt to kill and murder him, and unless such—that is, the intent—is established by a preponderance of the evidence, plaintiff could not recover. In other words, this is flatly in the face of the authorities above cited. Townsend, sec. 168; Starkie, vol. 1, pp. 68, 69, top page 60. I will ask the court to examine the cases cited in the notes to Townsend, sec. 168, and apply the authorities to the present question. "Thou hast killed a man" does not necessarily imply a crime. It might be done justifiably or accidentally, and yet the words are actionable when spoken without explanation or qualification, and so of the other instances given in the section cited. It is not necessary, to make words actionable *per se*, that they should necessarily imply a crime. It is sufficient that they naturally carry the imputation. The words "Mrs. Furr poisoned me" naturally import crime. They are actionable *per se*, as shown by authorities cited. The instruction deals with them as if they were not so actionable.

The third instruction given defendant is subject to the same objections, and is, if the thing be possible, even more erroneous. These instructions submit to the jury as a question of fact what the court should have decided as a matter of law; whether the language was actionable did not depend upon any other intent than the one which the law places on words which are action-

Brief for appellee.

able *per se*; the law conclusively fixes their meaning. The only question of intent involved in such case is the intent to speak the words; if that intent existed, it is immaterial whether the speaker intended, willed, the consequences of the publication. Townsend, ch. 5, secs. 60-92.

The speaking of actionable words to the plaintiff in the presence of other persons is a publication. Townsend on Slander and Libel, sec. 107, p. 151. It will be noted, too, that, in the conversation with Mrs. Furr, Speed was charged with other publications, and, according to plaintiff's evidence, did not deny the charge.

The fifth instruction given for defendant is misleading. Too much importance is given the little word "so." Why the court should have given *so* much significance to *so* small a word as "so" is beyond finding out.

Cassedy & Cassedy, for appellee.

The suit being a common law action, and the words spoken being in "plain and ordinary language, in common use, not ambiguous or doubtful," "under such circumstances the jury are the judges of the meaning and intent of the words." *Jarnigan v. Flemming*, 43 Miss., 720. The words used might have been sufficient to sustain a case founded upon the statute for actionable words, but not a case at common law for slander.

In the case of *Crawford v. Melton*, 20 Miss., 328, the words used were "C swore a lie, and I can prove it," and the court held the words to be within the statute, but not actionable at common law. There is just as much reason to contend that the words used in that case imputed to the plaintiff the commission of a felony as in this case, and more. In the last case cited, while swearing to a lie would seem that the person so transgressing was guilty of a crime, yet, in order to commit perjury, the party must knowingly swear to a lie, and his testimony must be upon some question material to the issue being tried, and he must have been sworn to tell the truth by an offi-

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cer authorized to administer an oath. We submit that the words themselves used in this case are not *per se* actionable at common law, nor are they actionable taken in connection with the other evidence in the case.

The instructions for the defendant are not erroneous unless the court erred in refusing the peremptory instruction, for they merely inform the jury that they must believe that Speed intended to charge Mrs. Furr with intentionally poisoning him and being guilty of an attempt to kill, and that such fact should be established by a preponderance of the evidence. If the words used were not actionable *per se*, then the instructions were proper. Words spoken in answer to a question directed by the plaintiff herself, in the presence of the other ladies, would not amount to a publication of the slander, and, if the plaintiff relies on this alone to sustain her case, she should go with the answer that she had provoked the speaking of the words, and cannot, therefore, avail herself of the advantage gained.

STOCKDALE, J., delivered the opinion of the court.

This is an action of slander brought by appellant (plaintiff in the court below) against appellee (defendant in the court below) to recover damages for injury to character by the speaking and publishing, as is alleged, of slanderous words by appellee of and concerning appellant. The complaint charges that appellee said of appellant, "Mrs. Furr poisoned me," to which the defendant pleaded "Not guilty." On the trial, plaintiff testified that appellee took dinner at her house on one occasion, and she passed him a cup of coffee, and her husband helped his plate. Mr. Speed soon rose from the table, threw the food out of his mouth, said he was sick, and after awhile left the house and premises. Some time after that she heard that he had told in the neighborhood that she had poisoned him. She went to his house, and asked him what grounds he had for believing that. He said he felt like he was poisoned. She asked him what grounds he had to believe that she had

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poisoned him. He replied: "I am sorry to say it, but if I had taken another sip of that coffee I would have died on the spot;" and that she had poisoned him. This conversation was wholly addressed to Mrs. Furr, but in the presence of two witnesses that were with her, according to the testimony of plaintiff, and they corroborate her. Albert D. Moore testified that in 1892 Mr. Speed (appellee) told him that he (Speed) had just come from Mr. Furr's, and he believed that he was poisoned, and that he got the poison in the coffee which was given him for dinner at Furr's. Defendant testified in his own behalf that on the occasion referred to he took dinner at Mr. Furr's, and Mrs. Furr passed to him a cup of coffee. He took a sip or two of it, and it made him violently sick. After leaving there, he told a number of persons that he believed he had been poisoned, and that he believed the poison was in the coffee, and Mrs. Furr (the plaintiff) gave him the coffee; that he had never said to anybody that Mrs. Furr poisoned him, nor that he believed she had poisoned him; never charged Mrs. Furr with poisoning him. The most he ever said was that the coffee made him sick, and he believed it had poison in it. He denied the conversation at his house with Mrs. Furr as related by her and the other two witnesses. He made no declarations that Mrs. Furr had poisoned him, nor admissions that he had ever so stated. This testimony having been submitted to the jury, they found a verdict for defendant. The plaintiff moved for a new trial, and the motion was denied, after being considered by the judge under advisement.

The plaintiff asked a peremptory instruction, which was refused by the court, and plaintiff excepted. We think this instruction was properly refused. There was conflicting testimony in the case sufficient to preclude a peremptory charge. Plaintiff then asked a number of charges, which were given, No. 2 of which is in the following words, to wit: "If the jury believe from the evidence that Speed said to Mrs. Furr, in the presence of other persons, that Mrs. Furr had poisoned him,

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or that he believed she had poisoned him, then they will find for plaintiff." The fifth instruction given at the instance of plaintiff charges that "if they believe from the evidence that the defendant said of and concerning the plaintiff that Mrs. Furr poisoned him, or words to that effect, they must find a verdict for plaintiff." It is not necessary to pass upon the legality of the modification by the court of instruction No. 3, asked by plaintiff. It was manifestly erroneous as asked. The court was asked to charge the jury that it was unnecessary for plaintiff to show affirmatively that she had really suffered damages, but without such proof she is entitled to recover such damages, etc., without stating that "if they believe the slanderous words were spoken;" nor do the subsequent words cure the defect. They only furnish the jury the means of measuring the amount of damages after the right to recover had been announced. The fourth instruction given at the instance of plaintiff seems to have been drawn rather broadly. While it is true, as stated, that it is not necessary to plaintiff's recovery that she should prove every averment of the declaration, it is giving too much latitude to say, "If she has proved her case substantially." This court said, in *Fritz v. Williams*, 16 South., 359, by Justice Whitfield, after an extended review of cases on the subject: "The rule in *Jones v. Edwards*, 57 Miss., 28, is the better one, meaning what Mr. Odger says, and what it plainly shows upon its face it means, that 'synonymous words,' conveying the same specific idea—the same identical thought—will do." And that is as far as this court has gone in relaxation of the old rule requiring the precise words charged to be proved in order to recover. The law is properly announced in charge No. 7 for plaintiff.

These instructions, with others, given for plaintiff, brought the case to a single point for the jury to determine, to wit: Did the defendant speak the words charged in the declaration, or synonymous words conveying the same specific idea, the same identical thought? If the words charged in the declara-

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tion, and others as testified to by the witnesses for plaintiff, were spoken and published, they are actionable. The defendant met the charge by a straight denial that such words were spoken, and, if that were correct, then there is no cause of action in this case. To enable the jury to arrive at a correct conclusion on that issue of fact (the court having charged the jury at the instance of plaintiff), the defendant presented instruction No. 2, in the record, which was given, charging the jury that no recovery could be had in this case unless the exact words alleged, or synonymous words, had been spoken by the defendant. Words of synonymous meaning, conveying the same specific idea, is, of course, what the court meant by the language of that instruction, and we do not think there was error in giving it. Nor do we find error in the granting of the fourth instruction asked by the defense. Plaintiff's seventh instruction informs the jury that the law implies both intention to injure and damage from the speaking of slanderous words. Defendant's instruction No. 2, informs the jury that if the words upon which the law so presumes damages and bad intention were not spoken at all, then these presumptions will not exist; and defendant's fourth instruction is, for similar reasons, free from objections. Nor do we find error in the giving of the fifth charge for defendant, and, had the case been tried with the same result upon those instructions, above referred to in this case, the verdict would not now be disturbed. But, in addition, instructions Nos. 1 and 3, asked by defendant, were given to the jury, both of which are objectionable, and may have had weight in shaping their verdict. The authors on the subject of slander concur that no general rule can be laid down by which to determine what words or phrases will support an action for libel or slander; so much depends on the attending circumstances of each case. Starkie, in his work on slander (section 55), quotes from the opinion in the early case of *Button v. Heyward*, 8 Mod., 24, by Chief Justice Pratt. An action was brought against Mrs. Heyward for speaking the words: "I know the man that killed

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my husband; it was George Button," her first husband being dead. Those words were held to be actionable. The lord chief justice said: "We are to understand words in the same sense that the hearers understand them. We ought to expound words according to their general signification, to prevent scandals. It is the duty of the jury to construe plain words and clear allusions to matter of universal notoriety, according to their obvious meaning, and as everybody who reads must understand them." Lord Mansfield; in *Rex v. Horne*, Cowp., 680; *Hume v. Arrasmith*, 4 Am. Dec., 626, "the use of such words and signs as do, in effect, injure the reputation of an individual, are within the mischief; the grievance is the loss of character." Starkie, *Sland. & L.*, p. 60, sec. 60. Guided by the above announced doctrine, it has been held slander to say, "I will call him in question for poisoning his aunt, and make no doubt to prove he has poisoned his aunt." And the words were held to be actionable. Townsh., *Sland. & L.*, sec. 68. A general count in an action for slander—as, charging the plaintiff with stealing—is good. *Nye v. Otis*, 5 Am. Dec., 79. The books abound with instances where similar phrases and of similar character, published by writing or voice, were held to be actionable. Had the words alleged in the complaint in this cause, "Mrs. Furr poisoned me," and those testified to by the plaintiff's witnesses, "I am sorry to say it, but you did poison me, and, had I taken another sip of that coffee, I would have died on the spot," been among these enumerated cases, we do not see why they would not have been in proper company. Poisoning was and is a crime at common law and by statute—murder, if death ensues; attempt to murder, if death does not follow—and to charge either crime upon any person by any expression generally and commonly understood by the persons addressed, constitutes the wrong, and the words are actionable. See authorities cited above. To say a man swore falsely, or swore a lie, the words are not actionable; but if one say of another, "He committed perjury," the words are actionable, because the words

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“themselves, as generally understood, impute an infamous crime;” and it would be error to instruct the jury that they must believe, from the evidence, that the speaker intended to charge thereby, by name, all the ingredients that constitute perjury before recovery could be had. The word “perjury” is known to mean an infamous crime in common parlance, and, when charged by a name that conveys to the hearers the idea that one is guilty of that crime, the damage is done as effectually as though charged in the elaborate phraseology of an indictment. Judges and lawyers themselves use the descriptive terms “perjury,” “murder,” “arson,” etc., to designate those crimes, and on the docket of the court they are so used. In most of the states of the American Union, including Mississippi, as well as in England, the enlightened doctrine is maintained that people are entitled to protection against the slanderer in their good name as well as in their profession and business reputation and their property, and the humble as well as the great can invoke it.

In view of the authorities cited, and numerous others which we have examined, it was error in the court below to charge the jury as asked by defendant in instructions Nos. 1 and 3, wherein, by No. 1, the jury are charged: “That before any recovery can be had in this action, the evidence must satisfy the jury, not only that the defendant said that Mrs. Furr poisoned him, or words of synonymous character, but it must be established, further, that the words were so spoken by the defendant with intent, and that he meant thereby, to say and publish that Mrs. Furr intentionally poisoned him, and was guilty of an attempt to kill and murder him by poisoning him, and, unless such is established by a preponderance of the evidence, the jury will find for the defendant.” Instruction No. 3 corroborates No. 1, and is erroneous.

We do not concur in the expression of counsel for appellant to the effect that if the words spoken, or alleged to have been spoken and published by defendant, were actionable *per se*, a peremptory instruction ought to have been given for plaintiff.

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The plaintiff and her witnesses testified to certain words spoken to her in presence of third persons, which words are actionable, if so spoken. The defendant, in his sworn testimony in the case, denied that such words were spoken at all, but another set of words, and those only, were spoken. That was the issue before the jury, raised by the plea of not guilty to the declaration. The jury had the right to believe the one or the other, and with that conflicting testimony in the cause the court could not give a peremptory instruction, but must allow the jury to find on the facts. The jury, by their verdict, indicated that they believed the case was not made out, but how much weight the two erroneous instructions had upon their minds in aiding them to arrive at that conclusion is not known, but it is fair to presume that those vigorous utterances may have materially influenced their judgments, and, much as we dislike to disturb a verdict where two trials have been had reaching the same result, we do not think a verdict should be allowed to stand, where vital principles of public policy are involved, until the record shows a perfectly fair trial with the law properly announced. We think that the motion for a new trial should have been granted for the reasons above stated.

The judgment of the court below is reversed, a new trial granted, and the cause remanded.

Brief for appellant.

JEFFERSON COUNTY v. KATE W. GRAFTON ET AL.

1. COUNTY. *Title to land. Grantees of county. Estoppel.*

Purchasers claiming title to land under a deed from a county, cannot, in a suit by the county to cancel their deed, defend on the ground that the county was at the time of its purchase without power to acquire the property.

2. SAME. *Power to sell land.*

A county is not a municipal corporation proper, and, before § 304, code 1892, became operative, was not authorized to sell land, though the same was not applied to a public use.

3. SAME. *Board of supervisors.*

A board of supervisors is not bound by the acts of its predecessors, unless such acts were within the scope of their authority.

FROM the chancery court of Jefferson county.

HON. O. S. ROBBINS, Special Chancellor.

The facts are stated in the opinion of the court.

Wiley N. Nash, attorney-general, and *Jeff Truly*, for appellant.

In a suit like the one at bar, the grantee is estopped from denying the validity of the title conveyed by the deed whereunder he took possession of the land. *Cowell v. Springs Company*, 100 U. S., 55; *Cromwell v. Craft*, 47 Miss., 44; *Wade v. Thompson*, 52 *Ib.*, 367; *Clemens v. Meyer*, 44 La. Ann., 390.

The deed to the board of supervisors, in 1874, vested in the county of Jefferson title as against the world, subject only to the right of the state to object. Their power can be questioned from no other source. *Quitman County v. Stritze*, 70 Miss., 320. Boards of supervisors may, by law, acquire real estate for certain purposes, and, having such capacity, conveyances to

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them are not void, but voidable only. The sovereign alone can object. 4 Am. & Eng. Enc. L., 433, and cases cited thereunder; *Natoma Water & Mining Co. v. Clarkin*, 14 Cal., p. 552; *Hough v. Land Company*, 73 Ill., 23.

Did the orders and instruments passed and executed by the board of supervisors divest the county of Jefferson of its title to the property in controversy? We maintain that this question should be decided in the negative, and for two reasons: (1) Incapacity of grantees, (2) lack of power in grantors to convey. Submitting to the court for determination, without argument, the question (which we think open to grave doubt), whether the self-styled trustee ever had the legal capacity to hold title to real estate, even under the first so-called conveyance of the board of supervisors, we do earnestly contend and insist that any powers they may have had were revoked and annulled by the order of the Presbytery of Mississippi, dated April 5, 1884, forming a part of exhibit F to the bill of complaint, by which the presbytery declined to accept the property subject to the conditions imposed, and directed the trustee to convey any title held by said presbytery, provided the grantees accepted the conditions—that is, established and maintained a first-class white female school on the premises. Granting that they, as trustees, and the association which they claimed to represent were capacitated to receive title to real estate, these powers were finally ended and revoked by the refusal of the association to accede to the conditions imposed by the first conveyance of the board of supervisors.

Have boards of supervisors the power to make donations of county property to private persons or for private purposes? Clearly, boards of supervisors have no authority to either sell or give away property of the county, unless especially authorized by an enabling act, or by some definite expression of legislative will. *Howe v. State*, 53 Miss., 69, 70; *Supervisors of Jefferson County v. Arrighi*, 54 Miss., 668 and cases cited. See, also, 50 Miss., 737; 73 N. C., 255.

Brief for appellees.

Recognizing the fact that boards of supervisors were without authority to sell or dispose of the property of their respective counties, even where the property had ceased to be of use to the county, and when they could dispose of it on advantageous terms, the legislature passed a law empowering boards of supervisors "to sell and convey" county property (real estate) when "it shall cease to be used for county purposes." Annotated code, 1892, § 304. Unless the legislature was at fault, unless the learned code commissioners erred, boards of supervisors did not have this power prior to the passage of the law above quoted.

S. C. Coffey, for appellees.

Under §§ 500 and 501 of the annotated code of Mississippi, before clouds upon title can be canceled or removed, and the title be confirmed in complainant, it is incumbent upon him to show entire fairness of his own, and, further, he must show that he is possessed of a perfect legal or a perfect equitable title; the mere fact that he might show the invalidity of his adversary's will not suffice. *Boyd v. Thornton*, 13 Smed. & M., 338; *Toulmin v. Heidleberg*, 32 Miss., 268; *Handy v. Noonan*, 51 Miss., 166; *Griffin v. Harrison*, 52 Miss., 824. And complainant's bill must make full deraignment of its title—that is, he must prove or justify his title, otherwise his bill is demurrable. We submit that, in this controversy, complainant's bill absolutely fails to show either a legal or an equitable title such as should enable it to remove clouds and confirm title in itself.

A county may be defined as a sub-political division of a state, deriving its powers to purchase and hold real estate by legislative enactment. Property of this nature, purchased otherwise than in the manner specified by statute, vests no title in the county, and could have no other effect than to subject the officers purchasing the same, or rather the officer who held the funds belonging to the county, liable for the misappropriation of its moneys.

Brief for appellees.

The code of 1871 did not, nor the acts amendatory thereto, nor any special act of the legislature prior to the date of the purchase, authorize or empower the board of supervisors to invest the county moneys in lands. Said purchase being unauthorized by law, could in nowise vest title in complainant.

The second ground of demurrer urged against the bill is that it shows upon its face that whatever title complainant may have had to the property, was duly and regularly parted with, as shown in exhibits "B" and "C."

The entire bill does not comply with the requirements of the statute, so as to enable complainant to assert title in itself, nor to remove clouds upon the same. First, it fails to show any title to the controverted land; second, if complainant ever had title, it parted with it for a valuable and lawful consideration, and that the conditions of said purchase and the price paid to and received by complainant, was sufficient in law to pass title, and did pass title, to the purchaser thereof.

E. S. & J. T. Drake, on the same side.

We have the extraordinary spectacle of a complainant coming into a chancery court and showing by its own allegations that it has parted with all right, title, and interest to a piece of real estate, by deeds properly executed, two in number, and by resolutions of the corporate body duly passed and entered on the minutes; that it has sat quietly by for twelve long years and seen the title to this property pass, for valuable consideration, from vendee to subvendee and sub-subvendee, and then, after setting out all these facts, asking the court to cancel its own solemn deeds, and the deeds of its vendee and the subvendee, as clouds upon its title! A statement of the facts set out in the bill ought to be sufficient brief. The facts suggest a demurrer.

Section 304 of the code of 1892 was merely declaratory of what was already well established law. "The right to dispose of property, not held for public use, is inherent in all corpora-

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tions, public or private, unless withheld by the law under which they are organized. And sales made by a municipal corporation, or board of supervisors, in the exercise of its discretionary power, cannot be annulled because improvident." 14 Am. & Eng. Enc. L., 1063, text; 4 *Ib.*, 378, text and notes, and 382, note 2; 15 Am. & Eng. Enc. L., p. 1063; 4 *Ib.*, 378, text and note; 4 *Ib.*, 382, note. And one board of supervisors is bound by the acts of its predecessors. 4 Am. & Eng. Enc. L., 375, and note.

It seems manifest from the record that the purchase of this property by the board of supervisors in 1874 was without authority of law and *ultra vires*. The record is silent as to the object of the purchase. But it is certain that it was either a purely speculative venture, or else it was bought with a view to establish a college. The board was not authorized to make the purchase for either purpose.

WHITFIELD, J., delivered the opinion of the court.

The averments of the bill, so far as material to the solution of this case, may be thus condensed: That the county of Jefferson bought, for \$4,000, on November 17, 1874, of Gilchrist, administrator, under a decree of the chancery court, a tract of land on which were the buildings constituting the Fayette Female Academy; that on September 4, 1883, the board of supervisors undertook to sell and convey said land to certain parties, purporting to be the trustees of the Presbytery of Mississippi, for \$100, upon the express condition, set out in the order of the board and the deed, that the presbytery should "establish and maintain a first-class white female school on said premises, within ten years from the date of confirmation of said sale," and that, if said presbytery should fail so to do, then "all of said property should revert to Jefferson county;" that on May 25, 1885, a new board of supervisors recited that the conditions had been complied with, in an order on their minutes, and directed an unconditional deed to be made to said

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board of trustees of said presbytery, which was made on May 28, 1885, said deed further reciting that it was given in "full confirmation of the deed of September 4, 1883;" that on April 5, 1884, said presbytery passed an order providing that, in the event the board of supervisors failed to secure the State Industrial School, the board of trustees of the Fayette Female Academy should convey the land to Rev. D. A. Planck, upon his assuming all the obligations imposed by the original contract, and promising the "support and encouragement of said presbytery" when the school "should" become worthy of their interest; that on August 29, 1885, Rev. P. S. Shaw, president of the board of trustees of the Fayette Female Academy, executed a deed of the land for \$100, to said D. A. Planck, said deed reciting that it was executed in pursuance of the "authorization and qualification" set forth in the aforesaid order of presbytery of April 5, 1884; that afterwards said D. A. Planck and wife conveyed said land to appellee, Miss Kate Wharton (now Grafton), for \$1,000 cash; that Miss Kate Wharton (now Grafton) afterwards conveyed one acre of the land to Mrs. Catherine Doyle, and the balance to Mrs. Bell B. Harper, for the considerations therein named; that the consideration of \$100 in the deed from the board of supervisors to said presbytery was so grossly inadequate as to make the deed amount to a pure donation of public property to private individuals; and, finally, that the conditions set out in said deed were never complied with, but violated; that there was not established and maintained on said premises, "within ten years of the date of the attempted confirmation of said pretended sale, a first-class white female school;" and that, hence, all said property had reverted to Jefferson county. And, with the bill, complainant tendered the \$100 received by the county on the alleged sale to said presbytery. Respondent's demurrer admitted all the facts well pleaded in these averments, and the demurrer was sustained.

It is first insisted by appellees that the county had no power

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to buy this land. Appellees went in under the county's title, and it is not for them to say the county had no power to buy. That is a matter of which the state alone could complain. *Quitman Co. v. Stritze*, 70 Miss., 320; *Hough v. Land Co.*, 73 Ill., 28; *Mining Co. v. Clarkin*, 14 Cal., 544; *Cowell v. Springs Co.*, 100 U. S., 60; 15 Am. & Eng. Enc. L., 1062.

Appellees next insist that municipal corporations have, generally, the power to dispose of property not held for public use, as an inherent power belonging to such corporations (citing 15 Am. & Eng. Enc. L., 1063); but, as stated expressly therein, even municipal corporations proper have no such power when it is withheld by the law under which they are organized, and a county is not a municipal corporation proper.

It is next insisted by appellees that sales made by municipal corporations cannot be annulled because improvidently made, citing the same authority. But it is expressly therein stated that this is true only where the corporation has the power to sell, and the question here presented is one of power to sell at all this property.

It is next urged by appellees that one board of supervisors is bound by the acts of its predecessors. But the authority cited, correctly shows that this is true only where the acts of "their predecessors were within the scope of their authority." 4 Am. & Eng. Enc. L., 375.

This brings us to the vital question in the case. Did the board of supervisors have, under the law as it then stood (the code of 1880, § 2144), the power to make the sale to the presbytery of this property? That section, after enumerating various powers, provides that the board "shall have such further powers as are, or shall be, conferred upon them by law." It is of significant aid in determining this question that not until § 304, of the code of 1892, was adopted, was there any provision made, as is therein made, that "in case any of the real estate belonging to the county shall cease to be used for county purposes, the board of supervisors may sell and convey the same,

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on such terms as the board may elect." Counsel for appellees contend that this section is merely declaratory of what the law was without it. But it is well said, in 4 Am. & Eng. Enc. L., p. 375, that, "being creatures of statute, endowed only with special powers, and created for special purposes, they can exercise only such powers as are expressly conferred by statute, or which are necessarily implied." And, again, at page 379, that their powers will, of course, vary in different states, according to the differing grants of powers to them in such states. And the course of judicial decision in this state holds them to the strictest limitations of their powers. As clearly put, in *Howe v. State*, 53 Miss., 69: "It matters not whether its action . . . be regarded as judicial, legislative, or ministerial. Excess of authority in either capacity is simply void. . . . They can do valid acts only as empowered by law." It was held in *West Carroll v. Gaddis*, 34 La. Ann., 928, that "property donated to a parish, in fee simple, for its use and benefit, and upon which a courthouse was built and used, cannot be legally sold under a police jury ordinance, although, the parish seat being changed, the building was abandoned, and threatened going to ruin; that such sale, having been made without legislative authority, is a nullity, and conveyed no title; and that, in such case, the defendants are entitled to reimbursement of the purchase money, as a condition precedent to the recovery of possession of the land by the plaintiff." This case is directly in point, and decisive of this controversy. The opinion of the court, by Bermudez, C. J., is so felicitously clear and accurate that we quote—to adopt—the following, as applicable to our boards of supervisors: "Parishes, like counties in other states, are involuntary political or civil divisions of the state, designed to aid in the administration of government, as state auxiliaries or functionaries, possessing no other powers than those delegated, ranking low down in the scale of corporate existence, and well distinguishable from municipal corporations proper, which are invested with more ex-

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tensive powers, and endowed with more important functions, and a larger measure of corporate life. As a rule, they cannot acquire real estate unless for public utility, and cannot dispose of the same after it has been acquired and devoted to public service without legislative authority. They may, however, be objects of public or private bounty, in the absence of disabling or restraining statutes. They do not acquire for themselves as a political organization. They acquire for the benefit of the public—the people—particularly the local community, which is represented primarily by the state and secondarily by them, but so far only as the state has delegated to them the power to do so. As state auxiliaries, they cannot dispose of public property, unless with formal sanction of the state, and even then in those cases only in which the state, violating no trust and no contract, and infringing the rights of no one, could herself legally act. Creatures they are wholly dependent upon and controlled by their creator. They have no life, no attribute, no power, no rights, no obligation, but such as have been conferred or imposed on them.”

The court clearly shows (at page 933) the distinction between the powers of *quasi* corporations, like boards of supervisors and municipal corporations proper, in the disposition of property. To the same effect, strongly emphasizing the doctrine, are *Com. v. Rush*, 14 Pa. St., 186; *City of Alton v. Illinois Transp. Co.*, 52 Am. Dec., 479, and notes at pages 486, 487.

We are clearly of the opinion, therefore, that the deed of the board of supervisors to the board of trustees of the presbytery, of date September 4, 1883, and the similar deed, between same parties, of date May 28, 1885, and all the other deeds set out in the bill of complaint, are null and void, and, as such, should be canceled as clouds upon the title of the county; and, the complainants having tendered with their bill the \$100 purchase money received by the county—

The decree is reversed, the demurrer overruled, and the cause remanded.

Statement of the case.

SOUTHERN RAILWAY CO. v. HENRY HUNTER.

RAILROADS. *Trespasser. Wilful injury by employe. Flagman.*

A railway company is liable in damages for injuries wilfully inflicted by its employe, a flagman, upon a trespasser by violently ejecting him from a rapidly moving train, when it appears in evidence that it was the duty of the employe to carry trespassers to the conductor, and, if he authorized it, to have the train stopped and put them off. *Railroad Co. v. Latham*, 72 Miss., 32, and *Williams v. Railroad Co.*, 19 So. Rep., 90, distinguished.

FROM the circuit court of Leflore county.

HON. F. A. MONTGOMERY, Judge.

The plaintiff, a negro boy fourteen years of age, endeavored to steal a ride on defendant's west bound passenger train. He was discovered by the flagman, who, with great violence, knocked him from the train while it was running at a high rate of speed. He lay upon the track where he fell, insensible for some hours, and was at length run over and seriously injured by defendant's east bound passenger train. He sued for damages, and the defendant, under the general issue, gave notice that it would prove that he was of sufficient mental capacity to commit a trespass, and was, in fact, a trespasser at the time of his ejection from the train; that the injury then inflicted, if any, was the act of an employe outside the line of his duty; and that he was a trespasser on defendant's track when struck by defendant's east bound train, and was guilty of contributory negligence.

On the trial of the action the flagman who knocked plaintiff from the train, was introduced as a witness by the defendant, and testified that when he found a trespasser on a train it was his duty to carry him to the conductor, and, if the conductor

Brief for appellees.

so directed, to pull down the engineer, stop the train, and put him off.

The court below refused to grant a peremptory charge for the defendant, but, at defendant's instance, instructed the jury that, unless they believed, from the evidence, that the flagman, Gresham, acting under his employment by defendant, wantonly and wilfully struck the plaintiff and knocked him off a moving train of defendant, they should find for the defendant, although they might believe that plaintiff was afterwards struck and injured by a train of defendant.

On behalf of the plaintiff, the court instructed the jury to find for him if they believed that he was violently thrown from the train of defendant by the flagman, Gresham, while the same was in motion, and seriously injured.

There was a verdict for plaintiff in the sum of one thousand dollars, and the court, having overruled defendant's motion for a new trial, predicated of the court's action in refusing to grant defendant's request for a peremptory charge, and in granting the instruction asked by the plaintiff, this appeal was prosecuted.

Yerger & Percy, for the appellant.

The plaintiff's claim was not based on any negligence in the operation of the east bound train, which struck him while he was lying on the track, but upon the misconduct of the flagman, Gresham, in ejecting him violently from the west bound train while the same was in motion. This act of the flagman was clearly beyond his authority and without the line of his duty, and imposed no liability on the defendant. *Railroad Co. v. Latham*, 72 Miss., 32; *Williams v. Railroad Co.*, 19 So. Rep., 90.

Coleman & Somerville, for the appellees.

1. If the failure to include, in the single instruction for the plaintiff, the idea that the act of the flagman must have been within the line of his duty was erroneous, the error was cer-

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tainly cured by the instruction granted for the defendant, which makes the plaintiff's recovery dependent on that fact.

2. There was no error in refusing defendant's request for a peremptory charge. It appears that it was the duty of the flagman who threw the plaintiff from the train to take physical possession of trespassers and carry them to the conductor, and to deal with them as the conductor might direct. If, in the discharge of this duty, he took charge of a supposed trespasser, and in violation of his duty to his master as well as to the individual, the courts will say *respondeat superior*, for, presumably, no tort will ever be committed if the instructions of the master are obeyed. *Richberger v. American Express Co.*, 73 Miss., 161. The cases of *Railroad Co. v. Latham*, 72 Miss., 32, and *Williams v. Railroad Co.*, 19 So. Rep., 90, are inapplicable to the facts of the present case.

WHITFIELD, J., delivered the opinion of the court.

It very clearly appears from the testimony of Gresham himself that he did have a duty to perform for the master in regard to trespassers found on the train, to wit: "To carry them to the conductor," and if the conductor told him to put them off, "to pull the engineer down, stop the train, and put them off." This fact, under the plaintiff's testimony as to what occurred, clearly distinguishes this case from the cases of *Railroad Co. v. Latham*, 72 Miss., 32, and *Williams v. Railroad Co.*, 19 So. Rep., 90.

Affirmed.

Statement of the case.

WILL STROTHER v. THE STATE OF MISSISSIPPI.

1. CARRYING CONCEALED WEAPONS. *Bodily harm. Code 1892, § 1027.*

Apprehension of bodily harm is not a defense, under code 1892, § 1027, to a charge of carrying concealed weapons. It is the apprehension of a serious attack which the statute make a defense, and this is the equivalent of "great bodily harm."

2. SAME. *Apprehension.*

The statute never designed to authorize men to carry concealed deadly weapons on a mere apprehension of some bodily harm; the apprehension must be of serious, or great, bodily harm.

3. SAME. *Actual apprehension.*

In order to make out a defense, the accused must not only have reason to do so, but must actually apprehend a serious attack from an enemy.

4. SAME. *Burden of proof. Reasonable doubt. Code 1892, § 1027.*

While the statute places the burden of proof of such defense upon the accused, yet so long as there is a reasonable doubt of guilt, or a probability of his innocence, the state has not satisfactorily made out its case.

FROM the circuit court of Lafayette county.

HON. EUGENE JOHNSON, Judge.

Will Strother was indicted for carrying a deadly weapon concealed. There was testimony tending to show that he was threatened and had good and sufficient reason to apprehend a serious attack from an enemy, and that he did so apprehend, etc. Defendant requested the court below to give the following instructions, being the ones numbered two and three, mentioned in the opinion of the court:

"2. The court instructs the jury that if they believe from the evidence in this case that the defendant, Will Strother, had reasonable grounds to apprehend danger of a bodily harm from

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Abe Thompson at or before the time at which he is charged with carrying the pistol concealed, then he had a right to carry it for his own protection, and the jury will find him not guilty.

“3. That if the jury believe from the evidence that after the barn of Abe Thompson was burned, and before the date at which the defendant is charged with carrying a concealed pistol, Abe and he were unfriendly, and Abe threatened to kill defendant if he crossed his path or came on the Martin farm, and if they further believe that these threats were communicated to the defendant, A then they will find him not guilty.”

The court below modified the second instruction by inserting the word “great” before the words bodily harm, and modified the third instruction by inserting the words, “and he apprehended danger from Abe, and on that account carried the pistol,” before the words, “then they will find him not guilty,” as indicated by the carets above.

The fourth and fifth instructions, asked by defendant, referred to in the opinion, were as follows:

“4. The burden of proof in this case is on the state to prove to the satisfaction of the jury, beyond all reasonable doubt, that the defendant is guilty as charged in the indictment, and unless you are satisfied of his guilt beyond a reasonable doubt you will find him not guilty.”

“5. Where there is a probability of the innocence of the defendant there is a reasonable doubt of his guilt, and you should then find him not guilty.”

John W. T. Falkner, for appellant.

The statute, § 1027, code 1892, requires nothing more than that the defendant shall, by his proof, raise in the minds of the jury a reasonable doubt of his guilt. He is not required to prove his innocence to the entire satisfaction of the triers. The statute simply places the defense in the category of affirmative defenses, and places it upon the same basis, for instance, as the proof of an alibi. In *Pollard v. State*, 53 Miss., 410,

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Chalmers, C. J., delivering the opinion of the court, treating of an alibi—an affirmative defense—announces the rule which should be and is applicable to the case at bar. He says: “There is but one question—there can be but one question in a criminal prosecution—‘Has the guilt of the defendant been established beyond a reasonable doubt?’ This is the *experimentum crucis* by which every juror must test the correctness of his verdict.”

Wiley N. Nash, attorney-general, for the state.

The reporter finds no brief for the state on file.

Woods, C. J., delivered the opinion of the court.

The modifications by the court below of the second and third instructions asked by the defendant were not erroneous. The statute, § 1027, authorizes one indicted for carrying concealed a deadly weapon to prove, by way of defense, that he “was threatened and had good and sufficient reason to apprehend a serious attack from an enemy, and that he did so apprehend,” etc., and both modifications were necessary to conform the instructions to the letter and spirit of the statute. An apprehension of “a serious attack” is the language of the statute. The charge as asked made an apprehension of “danger of bodily harm” the equivalent of the statutory requirement, and this was palpably wrong. The court, by its modification in inserting the word “great” before the words “bodily harm,” in the charge, cured its vice. An apprehension of a “serious attack from an enemy” and an apprehension of “great bodily harm,” are synonymous phrases. It was never the design of the statute to authorize men to carry concealed deadly weapons on a mere apprehension of some bodily harm. It is serious bodily harm, great bodily harm, that the threatened man may guard himself against by carrying concealed a deadly weapon.

The statute, by its very terms, makes the threatened man not only have good and sufficient reason to apprehend a serious attack from his enemy, but also requires him to actually apprehend such attack.

Brief for appellant.

The fourth and fifth instructions should have been given. While the burden of proving the defense made is devolved by law upon the defendant, yet it remains true that so long as there is a reasonable doubt of the defendant's guilt, or a probability of his innocence, the state has not satisfactorily made out its case.

Reversed and remanded.

J. H. McMATH ET AL. v. M. LEVY & SONS.

1. **FIXTURES.** *Landlord and tenant. Cotton gin.*

If a tenant buys and puts a cotton gin, condenser, and feeder upon the leased premises, with the intention of removing them, they do not become fixtures so as to belong to the landlord as against the vendee of the tenant who purchases during the lease. *Tate v. Blackburne*, 48 Miss., 1, and *Jennings v. Wilson*, 71 Miss., 42, distinguished.

2. **SAME.** *General doctrine. Exceptions.*

To the general doctrine in relation to fixtures made by one upon the premises of another, there are generous exceptions in favor of trade, manufactures, and tenants.

FROM the circuit court of LeFlore county.

HON. F. A. MONTGOMERY, Judge.

M. Levy & Sons brought replevin against McMath to recover the property in controversy. The evidence is sufficiently stated in the opinion of the court. The court below gave a peremptory instruction for plaintiff; a verdict and judgment having been rendered in accordance therewith, defendant appealed.

Coleman & Somerville, for appellant.

The gin stand, condenser, and feeder were fixtures, not removable by the tenant, and no unexpressed intention of the

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tenant could make them anything else. *Tate v. Blackburne*, 48 Miss., 1. Being fixtures passing with the land, the unrecorded bill of sale from the tenant to appellees could not operate against the lessor. *Jennings v. Wilson*, 71 Miss., 42.

Rush & Gardner, for appellees.

The case of *Tate v. Blackburne*, 48 Miss., 1, announces the well-defined rule on the subject of fixtures, and draws the distinction between the rights of vendors and tenants in the removal of property. That case held a gin stand to be a fixture against the rights of the vendor to remove it, but it recognizes the rule that a tenant enjoys the greatest liberality in the removal of his property where a vendor would be denied. *Cole v. Roach*, 37 Tex., 413, and 44 Tex., 500; *Perkins v. Swank*, 43 Miss., 349; Am. & Eng. Enc. L., vol. 8, pp. 48-58.

The case of *Wilson v. Jennings*, 71 Miss., 42, has no application to the case at bar. We think the rulings of the court below were clearly correct.

WOODS, C. J., delivered the opinion of the court.

The simple question presented by this appeal is, may a purchaser from a tenant who bought and put upon leased premises—a plantation—a gin, condenser, etc., with the intention of removing them at pleasure, remove and hold them against the landlord? The question is easily answered. Against the general doctrine of fixtures made by one upon the premises of another, there have always been generous exceptions in favor of trade, manufactures, and, as in the case before us, tenants. The placing of gins, condensers, etc., on plantations cultivated largely in our staple product, cotton, are essential to the preparation and manufacture of the article for market, and the rights of tenants, as against their landlords, are not to be doubted.

The tenant not only put the machinery in question upon the leased premises during his term, but he did so with the inten-

Response to the suggestion of error.

tion to remove them, and his action was not only known to the landlord, but was necessitated by the refusal of the landlord to furnish for his tenants' use the indispensable gin and its accompaniments. The removal of the gin, etc., was sought to be made by the purchaser during the period of the lease, and before the tenant can fairly be said to have surrendered the premises. The cases cited by counsel for appellant are not analogous. *Tate v. Blackburne*, 48 Miss., was one in which the vendor of a plantation sought to retain a gin on the premises against the claim of the purchaser. This court very properly held that the title to the gin passed with the sale of the plantation. In *Jennings v. Wilson*, 71 Miss., it was held that the owner of personal property, who had sold the same to another, and secretly reserved the title as security for payment of the purchase money, could not maintain his title against a judgment creditor of the purchaser, where the latter had held the property more than three years. Thus it will be seen that neither case touches the question here involved. Our examination has unearthed no authority, in this country, opposed to the soundness of this view, which was taken by the learned court below.

Affirmed.

A. H. Jayne, for appellants, after the delivery of the foregoing opinion, filed an elaborate suggestion of error, insisting that the testimony of one of plaintiff's witnesses, Ullendorff, was incompetent, and should have been excluded by the court below, and that, without the testimony of that witness, the evidence was insufficient to maintain plaintiff's case.

WOODS, C. J., delivered the following response to the suggestion of error:

Conceding that the evidence of Ullendorff, on the trial below, should have been excluded, as vigorously contended by the learned counsel, still, on the evidence of McMath himself, no

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other judgment could have been rendered than that which was actually rendered, and we are constrained to decline to disturb it on this ground.

If the vendees of the tenant had the right to remove the gin, condenser, and feeder, as held by us in our original opinion, the wrongful act of the tenant in carrying off a gin belonging to his landlord, or in negligently permitting it to be lost or destroyed, did not affect that right. The tenant only thereby laid himself liable to his landlord for such wrongful act, or for his negligence, whereby the gin of the landlord was lost or destroyed.

We adhere to the former opinion.

MOBILE & OHIO RAILROAD CO. v. D. N. STINSON.

1. EVIDENCE. *Res gestæ. Agent. Declarations.*

The declaration of a railroad section foreman, who set out fire on the right of way of a railroad company, while the fire is yet burning, as to the origin of the fire, are admissible in evidence in an action against the railroad company for loss resulting from the fire, as part of the *res gestæ*.

2. FIRE. *Damages. Negligence.*

The setting out of fire on one's own land may be, and is, under some circumstances, sufficient proof of negligence to entitle the owner of adjoining lands to recover damages caused by the spread of the fire.

3. SAME. *Contributory negligence.*

One who uses his land in a natural and ordinary way, for purposes to which it is suited, is not required to anticipate negligence by a railway company whose track is adjacent, and his failure to so manage his business as to protect his property from loss against such negligence, is not contributory negligence on his part.

4. RAILROAD. *Section foreman. Scope of agency. Judicial knowledge.*

Where there is no dispute as to a railroad section foreman's agency,

Brief for appellant.

the court will take knowledge of the fact that it was his duty to keep both track and right of way in proper condition. .

5. COMPROMISE. *Offers. Statement of value.*

The fact that a plaintiff has offered to accept a sum of money in full settlement of damages for the destruction of his property by fire, and stated the property to be of such value, does not preclude him, on the rejection of the offer, from recovering such greater sum as the proof may warrant.

FROM the circuit court of Clay county.

HON. C. H. CAMPBELL, Judge.

This suit was brought by appellee to recover damages from the railroad company for the destruction, by fire, of a large number of pecan trees. The evidence showed that the railroad right of way and appellee's adjoining pecan grove were both covered with tall grass and weeds, which were highly combustible; that on quite a windy day the railroad section foreman, for the purpose of clearing the same, set fire to the grass and weeds on the right of way, from which the fire spread and destroyed the trees for which the suit was brought; that the fire originated on the right of way was proved independent of the declarations of the section foreman; but that it was set out by the foreman, as above stated, was shown only by his declarations, made during the progress of the fire. Before suit brought the appellee stated to the railroad officials, by letter, that he would accept a sum less than that demanded in the declaration, and stated that the trees were worth less than the value claimed and recovered in the suit.

The verdict and judgment of the court below were for appellee, and the railroad company appealed.

Critz, Beckett & Jones, for appellant.

A person is not liable for damages by fire which commenced on his premises, spreading to the property of another, in the absence of proof of some misconduct or negligence on his part, the burden of proving which is on the plaintiff, and the happen-

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ing of fire or the destruction of the property does not raise a presumption of negligence. 3 Lawson's Rights, Remedies & Practice, p. 2446, sec. 1354, and p. 2458, sec. 1361.

It will readily be admitted, without referring to authorities, that a railroad has a right to clear and burn off its right of way, not only to protect adjacent property, but in order to have a clear track and unobstructed view, and thus prevent collisions and other disasters, and to better secure the safety of their passengers and freight.

The plaintiff was guilty of negligence or contributory negligence on his part. His pecan trees were only about eighteen inches high, and, instead of cultivating them, he allowed them to be overrun and taken with grass, which was three feet high, and, of course, completely obscuring the trees, so that there was nothing to put the section foreman on guard, or warn him that any extraordinary care was necessary. The grass was worthless and is not sued for. *Kesee v. Railroad Co.*, 30 Iowa, 78; *Murphy v. Railroad Co.*, 45 Wis., 222; *Chicago, etc., Railroad Co. v. Simonson*, 54 Ill., 504; 1 Rice on Evidence, p. 119, sec. 82.

The declarations of the section foreman were not admissible in evidence; were not part of the *res gestæ*. Before the declarations of an agent are admissible, the agency must be established by independent evidence, and this was not sufficiently done, and cannot be established by his declarations. This rule is announced and authorities referred to in *Memphis & Vicksburg Railroad Co. v. Cocke*, 64 Miss., 713, 716.

And they must be made by him about a matter in which he was acting within the scope of his authority. The scope of the foreman's authority was not proved. *Bernheim, etc., v. Hahn*, 65 Miss., 459, 462; *Wells v. Alabama Great Southern Railroad Co.*, 67 Miss., 24, 31, 32.

And, moreover, must be while he is so acting, and about the matter in which he is acting, so as to give character to, and throw light on, the act which he was then performing. The

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foreman, when he made the declarations, was not so acting. *Bernheim v. Hahn*, 65 Miss., 459-462; *Vicksburg, etc., Railroad Co. v. McGowan*, 62 Miss., 682.

Fox & Roane and *J. J. McClellan*, for appellee.

It is a well-recognized principle that the declarations of a servant are admissible against the master, when made with reference to the actions of the servant within the scope of his authority, and at a time when such action, or their direct results, are in progress. It was a part of the section foreman's duty to burn off the right of way, and he was engaged in his master's business, both at the time he set out the fire and at the time he made the declarations. Not only so, but these declarations were made while the fire was burning, and in explanation of the same. They were a part of the *res gestæ*, and admissible. *Yazoo, etc., R. R. Co. v. Jones*, 73 Miss., 229. It is negligence on the part of a railroad company to allow dry grass to accumulate on its right of way, and it is liable for starting a fire in such grass, which is communicated to adjoining property. *Flyma v. Railroad Co.*, 43 Col., 14; *Kesee v. Railroad Co.*, 51 Ind., 150; *White v. Railroad Co.*, 30 Iowa, 78; *White v. Railroad Co.*, 13 Am. & Eng. R. R. Cas., 473; *Railroad Co. v. Sharefelt*, 47 Ill., 417. It is true a railroad company has the right to set fire to and burn the dry grass on its right of way, but it is bound, at its peril, to keep such fire on its own limits. *Railroad Co. v. Overman*, 29 Am. & Eng. R. R. Cas., 161; 110 Ind., 538. The negligence of the company was settled already by this court in *M. & O. R. R. Co. v. Gray*, 62 Miss., 383. It has often been decided that land-owners are not guilty of contributory negligence on failing to keep land adjoining the right of way of a railroad company free from combustible material. 110 Am. & Eng. R. R. Cas., 76; 44 *Ib.*, 334; 23 *Ib.*, 364; 18 *Ib.*, 154; 76 Mo., 217.

WOODS, C. J., delivered the opinion of the court.

When Page, the section master, made the statement to the

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witness, Paine, as to the origin of the fire, which partially destroyed the pecan grove of appellee, the conflagration was then raging, and it was a declaration explaining other parts of the act of the destruction of the grove, of which it was itself a part. The injury complained of was the burning of the grove, on account of the carelessness of the appellant's servants in setting out fire on the right of way of the railroad, and any declaration made by the section master, the servant who set out the fire, as to the origin or progress of the fire, while the conflagration was yet incomplete and unfinished, was clearly admissible, in our opinion. In that case such declarations were part of the *res gestæ*, and not a narration of a past and completed event. To confine the admissibility of such declarations to any one point of time, in the course of the transaction being inquired about, would be to arbitrarily exclude, often, not to say always, many pieces of evidence which would shed light upon the whole affair, and which were parts of one entire event. We know of no more clear and concise statement of the law in such cases than is to be found in the case of *Mayes v. The State*, 64 Miss., and that case, taken with the later one of *Yazoo & Mississippi Valley Railroad v. Jones*, 73 Miss., 229, must govern this contention in the present appeal.

It is earnestly insisted that to permit the judgment to stand would overturn the well-settled principle that one is not liable for damages for injuries suffered by another by reason of fire spreading from the premises of the first named to those of the other party, where no negligence is proven. But this contention is unsound. Multitudes of cases can be imagined where proof of the fact of putting out fire at all would authorize a presumption of negligence. In the present case, the evidence that fire was put out, on a windy day, in high dead grass on the right of way, which immediately adjoined the premises of the appellee, likewise covered with dry grass of considerable height and great thickness, and, in the absence of any other evidence as to the course and progress of the flames, warranted

Response to the suggestion of error.

the jury in applying their experience and common sense to a solution of the matter, and in concluding that the fire naturally spread through this highly combustible material on the right of way to the highly combustible material on appellee's adjoining land, and that there was negligence in thus setting the grass afire and permitting it to spread out on appellant's lands. We cannot say the verdict is unsupported by evidence, and we do not feel authorized to disturb it. *Affirmed.*

Appellant's attorneys filed an elaborate suggestion of error, urging the points indicated in the following opinion:

WOODS, C. J., made the following response for the court to suggestion of error filed to the former (the foregoing) opinion delivered in this case:

1. There was proof of the agency of the section master other than that contained in his own declarations. There was no dispute as to his agency. And as to the scope of that agency, we will employ that common knowledge possessed by mankind generally, in ascertaining whether it was his duty to look after and clear off the company's right of way. We take knowledge of the fact that it was his duty to keep both track and right of way in proper condition.

2. The appellee was not guilty of contributory negligence in failing to cultivate his pecan grove so as to keep down growing grass. We know of no reason for holding that a man is required to keep down grass in a pecan grove any more than in a meadow or cornfield. The law is "that one who uses his land in a natural and ordinary way for purposes to which it is suited, is not required to anticipate negligence by the adjacent railway company, and his failure to so manage his business as to protect his property from loss against such negligence is not contributory negligence on his part." *Home Ins. Co. v. Railway Co.*, 70 Miss., 119.

3. That the fire which destroyed appellee's pecan grove originated upon the right of way of appellant company was shown

Syllabus.

by evidence other than that contained in the section master's declarations. The agreed statement of counsel, sent us after the argument of the cause, is to the effect that the fire was seen by a witness, not the section master, on the right of way before it had reached the field of appellee. Reference to the stenographer's notes, since sent us also, shows the correctness of this agreed statement of the counsel.

4. The letters of appellee, and his sworn statement to the company, in which the value of the trees was said to be fifty cents each, do not preclude appellee from showing the truth, and establishing the real value of the trees. The letters and statement were written with a view to securing a settlement by compromise and without suit, and that the value of the trees was greater than that which appellee named in his letters and statement, is clearly shown by abundant evidence other than his own.

We adhere to our former opinion, and the suggestion is denied.

FRANCES HICKS v. MOLLIE BLAKEMAN ET AL.

74	459
277	55
74	459
294	681

1. CHANCERY COURT. *Guardian's sale of land. Rights of purchaser. Notice.*

One who claims under a guardian's sale, that was neither reported to nor confirmed by the court, nor made in compliance with the decree ordering it, is affected with notice of the infirmity in his title, and cannot claim the land as a *bona fide* purchaser for value, there being no evidence of payment of the purchase money save a somewhat vague recital in the guardian's void conveyance of a payment of one-half thereof at the time of sale.

2. SAME. *Improvements.*

One who, claiming under a guardian's sale that is void for want of confirmation and noncompliance with the decree ordering it, enters upon the land under the guardian's deed, and, in the honest belief that his title is good, makes permanent improvements thereon, is entitled to a decree for such improvements on the establishment of an adverse title. *Cole v. Johnson*, 53 Miss., 94, cited.

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3. SAME. *Measure of recovery.*

The amount that the market value of the land is enhanced by the improvements made thereon, in good faith, by one claiming under the void conveyance of a guardian, is the proper measure of his recovery on account thereof. *Nixon v. Porter*, 38 Miss., 401; *Wille v. Brooks*, 48 Ib., 542; *Clark v. Hornthall*, 47 Ib., 434; *Massey v. Womble*, 69 Ib., 347, cited.

FROM the chancery court of Yazoo county.

HON. H. C. CONN, Chancellor.

On October 2, 1877, complainant was the owner of the land in controversy by descent from her grandfather, the derangement of title set up in the bill being agreed to be correct. On that day her guardian, W. S. Epperson, petitioned the chancery court for leave to sell the land, the grounds of the petition being that the land was unproductive, and that her remaining estate was insufficient for the payment of her debts and for her support.

These allegations of the petition were attacked in this case as untrue. Complainant's mother and her uncles, James and Henry Vaughan, were made parties to the petition for sale, and citation was issued for them on the same day of the filing of the petition, and returned executed on the same day. The citation required the appearance of the parties at the October term, 1877. At that time no action was taken on the petition, which was remanded to the rules, for some reason unexplained by the record. At the April term, 1878, a guardian *ad litem* was appointed for complainant, who made formal answer for her. At the same term decrees *pro confesso* were taken against the next of kin, and, finally, on March 25, 1879, a decree for sale was rendered, without additional process for next of kin. By the decree the land was ordered to be sold for one-half cash, balance on credit, and, on April 26, 1879, the guardian sold the land, J. W. Ricketts becoming the purchaser of a lot in the town of Vaughan's Station for \$150, and N. Birmingham purchasing the remainder for \$1,253.75, and on the same date the

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guardian executed deeds to the purchasers, the deeds reciting that the decree required the sale to be for one-half cash, and the balance payable on November 1, next following; that the grantees were the highest bidders at the sums mentioned, and that the lands were struck off to them in consideration of said respective sums "paid and secured to be paid." The sale was never confirmed and never reported by the guardian, who wasted or misappropriated the half of the purchase money received by him. The guardian never filed any accounts with his ward, and on April 10, 1882, he was removed by the court. In 1877, when the land was sold, the complainant was only three years old. Ricketts sold the land bought by him at the guardian's sale to his wife, she conveyed it to Sharp, Tucker & Co., and it is now claimed by and is in the possession of one J. S. Tucker, one of the defendants, who bought from the surviving partner of Richardson & May, who acquired title in some way undisclosed by the record.

Birmingham, the other purchaser at the guardian's sale, having died in 1882, his estate was declared insolvent, and his real estate ordered sold. At the sale by the executor, on March 10, 1884, J. L. Blakeman, Birmingham's son-in-law, and husband of defendant, Mollie Blakeman, bought twenty acres of the land in controversy, which Blakeman afterwards conveyed to Mrs. Ida Tucker. Twenty-four acres of the land were also bought by A. J. Collins at the executor's sale, and these he afterwards conveyed to J. L. Blakeman, and he to defendants. The remaining portions of the lands were inherited by defendants, Mollie Blakeman, Ada Croom, and Norma and Wanda Tucker, from Birmingham—John Birmingham, another heir, having conveyed his interest to them on July 2, 1884. On March 26, 1890, several heirs of N. Birmingham partitioned the land among themselves, and since then have held the same in severalty, as shown by complainant's bill. J. S. Tucker was in possession of and claimed the purchase by Ricketts at the guardian's sale under mesne conveyance from him, and the re-

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maining portions of the land sold by the guardian were in possession of and claimed by the other defendants—sixty acres by inheritance from Birmingham, and forty-four acres by purchase from the purchasers at the sale by the executor of Birmingham's estate. The sale by the executor occurred nearly two years after the removal of Epperson as complainant's guardian.

On May 24, 1894, complainant filed her bill in the chancery court of Yazoo county, setting up the foregoing facts, alleging that the sale by the guardian was void; that she was the true owner of the land in controversy, and praying that the defendant's title be canceled, and that she be adjudged the real owner, for possession, for rents and profits, and for general relief. The defendants answered, setting up that Ricketts and Birmingham purchased in good faith, and paid the purchase-money at the sale by the guardian, and interposing the two years statute of limitations relative to lands sold by order of the chancery court. There was no evidence that the purchase money was paid apart from the recital in the guardian's deed of a payment of half the purchase money, which deeds were made before confirmation.

The answer further alleged that J. S. Tucker, as to the lot held by him and defendants—as to that portion bought from A. J. Collins—were purchasers in good faith and without notice. No evidence was offered in support of this defense, the deeds which showed that the consideration for the several conveyances had been paid, showing, also, that those conveyances were of the same imperfect title conveyed by the guardian.

Defendants further averred that though there had been no confirmation of the guardian's sale by the court, complainants had confirmed it *in pais*. This allegation rests partly upon an unsworn petition, filed by her mother as next friend during complainant's minority, for the removal of Epperson as guardian, in which it was alleged that Epperson had collected the purchase money, and failed to account for it, and that he was largely indebted to the complainant beyond the amount of the

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purchase money; and partly upon the acts of defendants, it not being shown that complainant had knowledge thereof, or had ever received any part of the purchase money, in remaining in possession and improving the property.

Defendants also set up that complainant was indebted to Epperson, who was a lawyer, for legal services and taxes paid, and sought to be subrogated to his right therefor against complainant. The evidence offered in support of this averment was a charge in his fee book for \$150 for services, it not being made to appear whether, even allowing this credit, Epperson would not still be indebted to complainant. As to the taxes said to have been paid by Epperson, the petition for removal shows that he had failed to pay them, and allowed complainant's land to be sold therefor. No evidence appears in the record of any taxes paid by Epperson.

Defendants also claimed the value of improvements made by them on the land and taxes paid by them thereon. The answer was made a cross bill, which was duly answered by complainant, denying its material allegations, and the cause went on regularly to hearing. Exceptions to defendant's answer were overruled, as was also a demurrer to the cross bill, but all the questions raised thereby arose also in the further progress of the cause.

On the hearing the chancellor decreed that the guardian's sale was void and conveyed no title, and that complainant was entitled to recover the land and rents and profits therefor, but that defendants were entitled to recover the value of improvements, and a reference was made to the clerk, as commissioner, to take and state an account of both, with leave to both parties to adduce further testimony before the commissioner.

The grounds of the attack on the title conveyed by the guardian were (1) want of confirmation; (2) want of jurisdiction, be cause of the failure to cause the next of kin to appear before the court when the petition of sale was finally acted upon, seventeen months after the term at which they had originally been

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cited to appear; (3) because the reasons for the sale, as alleged in the petition therefor, were untrue in fact. The voluminous record consisted largely of testimony as to the value of the rent and profits and improvements. On the testimony, the commissioner reported the value of the former at \$1,227. His report on improvements consisted of an estimate based on their cost, or the amount necessary to replace them, the estimate being \$1,600.50, plus taxes and interest thereon, \$282.90, total, \$1,883.40; and of an estimate as to how much the value of the land had been increased by reason of the improvements, the amount of that estimate being \$1,000. On complainant's exception to the report, the chancellor held that the amount recoverable for improvements was not the enhanced vendible value, but the amount necessary to replace them. The complainant appealed, and assigned as error (1) the action of the court in allowing any recovery for improvements, and (2) in allowing more than the value added to the estate by the improvements.

Barnett & Thompson, for the appellant.

In *Learned v. Corley*, 43 Miss., 687, it was held that a party is bound to take notice of all the defects appearing in his chain of title, and, as against rights springing out of such defects, cannot claim to be a *bona fide* purchaser without notice. Held, that the purchaser was not entitled to his improvements. The effect of this decree was to deny the sufficiency of actual good faith and honest ignorance of defects to support a claim for improvements where the title papers under which the purchaser claimed themselves disclosed the invalidity of his title. It declared that the good faith required by statute, in claiming improvements, was identical with that to establish a *bona fides* in acquiring title, and that neither could coexist with constructive notice of equities or superior rights, whatever might be the actual belief of the purchaser. The definition of Washburn, J., in *Green v. Biddle*, 8 Wheat., 1, of good faith in claiming improvements, by which the ignorant, but honest,

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belief of the purchaser was made the test, without reference to constructive notice, was by *Learned v. Corley* impliedly disapproved, and, if this case is authority, defendants are plainly not entitled to recover for improvements. But in *Cole v. Johnson*, 53 Miss., 94, *Learned v. Corley* was expressly overruled, and Judge Washington's definition was cited with approval, while *Cole v. Johnson* was itself approved in *Stewart v. Matheny*, 66 Miss., 21.

We have stated the decisions as strongly as possible for the appellees. We shall, nevertheless, undertake to show that *Learned v. Corley* should still be treated as authority, and that the rule of that case is much more in accord with the latest utterances of this court (*Pass v. McLendon*, 62 Miss., 580; *Stewart v. Matheny*, *supra*) than are the opinion and dicta in *Cole v. Johnson*.

In the first place, it is impossible to read the opinion in *Cole v. Johnson* without seeing that the learned judge who delivered it was laboring under the mistake that the sale in question, in *Learned v. Corley*, had really been confirmed by the probate court. We cite especially his language on page 101 to prove this statement. It is probable that the mistake was due to the dictum contained in an earlier report of the same case (*Learned v. Matthews*, 40 Miss., 210), to the effect that the probate court had no power to confirm after the next term succeeding a sale. That this decision was obiter, as there had been no confirmation of the sale referred to, was remarked by Campbell, J., in *Johnson v. Cooper*, 56 Miss., 608. But whatever the reason of the error, it is certain that in *Learned v. Corley* there had been no confirmation, and that the court, in speaking of that case, in *Cole v. Johnson*, supposed that there had been. If the fact of confirmation had been a distinguishing feature between the two cases, it is a fair inference that had the court, in *Cole v. Johnson*, known that the sale in *Learned v. Corley* lacked confirmation, the latter case would not have been overruled.

In the second place, the fact of confirmation constituted a

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marked difference between the two cases. In *Cole v. Johnson*, the record of the proceedings under which the sale was made, presented a decree for sale by the proper court, a sale made in pursuance thereof. and a regular confirmation which vested title. The defects preceded the decree of confirmation. That decree, however, adjudicated the regularity of the antecedent proceedings, and the purchaser was justified in relying on such adjudication and failing to search behind it for defects determined by the decree not to exist. Such is the effect of a decree of confirmation. *Voorhees v. Bank*, 10 Pet., 449; 12 Am. & Eng. Enc. L., 219, notes 4 and 5. *Cole v. Johnson* being, therefore, a case in which the validity of the proceedings had been regularly adjudged by the court's ratification, the decision meant no more than that the purchaser was not responsible if the court had erred in such adjudication. The error consists in the want of such adjudication. It is no error of the court preceding the sale, but the omission of the purchaser or his vendee to obtain ratification after sale, as they might have done. *Redus v. Hayden*, 43 Miss., 614; *Jones v. Hooper*, 50 Miss., 510; *Gibson v. Marshall*, 64 Miss., 72.

Though a purchaser may be excused for reliance upon a judicial decree of confirmation, we submit that he may not omit to perfect his purchase, as he may do, and afterwards claim ignorance of the very defect occasioned by his omission. He was bound to know the law, which required confirmation to complete the sale (*Alsobrook v. Eggleston*, 69 Miss., 833); and those claiming under him stand in no better position, as we shall attempt to show. For the present, we wish merely to point out the distinction between *Learned v. Corley* and *Cole v. Johnson*, the fact that the distinction was overlooked in the latter case, and that the distinction made it necessary to overrule *Learned v. Corley*, which overruling becomes, therefore, mere dictum, which this court need not now follow.

In *Pass v. McLendon*, 62 Miss., 580, and *Stewart v. Matheny*, 66 Miss., 21, the court receded from the doctrine of *Cole v.*

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Johnson, and returned to that of *Learned v. Corley*, in holding that, irrespective of the actual belief of the purchaser as to his title, he could not recover for improvements if the face of the title papers, under which he held, disclosed defects of title. In these cases the court once more applied the doctrine of constructive notice from apparent defects in title papers, to defeat the purchaser's claim for improvements, and held him bound to know everything appearing on the face of those papers. To that extent it is plain that *Cole v. Johnson* had been overruled and *Learned v. Corley* re-established, subject to an exception hereafter to be noticed. It is also to be noticed that the presumption of knowledge of defects appearing in the purchaser's chain of title, is not limited to the deed from his immediate vendor, but extends to every link in the chain.

In *Stewart v. Matheny* the purchaser obtained title through successive conveyances from a life tenant, which conveyances purported to convey a fee, and though actually ignorant of the estate of his remote vendor, which was all the title he had, his implied notice was held enough to bar his claim of improvements. If honest ignorance of defects alone were the test, the purchaser, in *Stewart v. Matheny*, should unquestionably have recovered his improvements; and it is plain that in denying such recovery, the court, of necessity, overruled the broad doctrine of *Cole v. Johnson*. Though that case was approved, the approval, under a familiar rule, was only the result reached on the facts, and not of every dictum contained in the opinion. We have already attempted to show that it was unnecessary to overrule *Learned v. Corley*, and, if this is true, it follows that the approval of *Cole v. Johnson* did not include the dictum overruling *Learned v. Corley*.

The single exception to the rule of *Stewart v. Matheny*, as announced in that opinion, is that a purchaser of land under judicial decree may be excused from the requirement of forming a correct opinion as to the validity of his purchase. He is not excused from forming some opinion, nor can he claim ignorance

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of the decree. But if his opinion is not correct, he is excused. It may well be questioned if this excuse did not refer only to decrees of the probate court, "under the view taken of that court by the appellate court." But, however that may be, the exception was expressly made in reference to *Cole v. Johnson*, and that case, so excepted, differs from this in the material respect of confirmation, and was a case in which the sale was incomplete for want of confirmation. In this view, the cases of *Cole v. Johnson* and *Stewart v. Matheny* are satisfactorily harmonized, but otherwise are in irreconcilable conflict. For why, on principle, in the absence of an adjudication of regularity, such as judicial confirmation, should not a decree carry notice of defects? No reason, in fact, exists why purchasers should be bound to take notice of defective deeds or wills, that does not equally apply to judicial proceedings, especially where they are not adjudged regular by confirmation. According to the rules relating to *bona fides* in acquiring title, decrees are no exception to the requirement that purchasers must take notice of everything appearing on the face of their title papers.

In *Canning Co. v. Foster*, 17 So. Rep., 683, Cooper, C. J., says: "The commissioner's right and power to sell were derived from and rested upon the decree, as the recital in the conveyance itself showed. Neither the decree nor the deed, standing alone, was sufficient to convey title. Together and constituting one inseparable and indivisible unit, they formed a single link in the chain of title. Registration of the deed warned those who sought to secure the title it professed to convey that further and additional information should be sought by examination of the proceedings under which the sale was made. Of the facts which such an examination would disclose, purchasers were bound to take notice at their peril." And this was but an application of the same rule of notice which, in *Stewart v. Matheny*, was invoked to bar a claim for improvements made in actual good faith.

Why, on principle, should purchasers be bound to take notice

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of defective judicial proceedings occurring in their chain of title when their rights to the land itself—the subject of their purchase—is in question, and not when the lesser and incidental thing—the right to recover for improvements—is involved? The identical rule of notice being applied to both subjects, it is plainly inconsistent to make an exception in one case and not in the other. The application of the rule may be denied, as it was in *Cole v. Johnson*; but when it is asserted, as it was in *Stewart v. Matheny*, it should seem that a similar application should be made in both cases. The question is, whether actual ignorance of defects, in spite of constructive notice, is sufficient to entitle one to recover for improvements; or whether constructive notice, in spite of actual ignorance, is sufficient to defeat recovery. Either one or the other must prevail; both cannot. If *Learned v. Corley*, on its facts, is to stand overruled, it is an exception which is proved by every rule of precedent and principle to be arbitrarily, and without reason, opposed to the rule itself. But by maintaining that decision on its facts, because the sale in that case was incomplete for want of ratification by the court, and thus distinguishing it from *Cole v. Johnson*, which also can be sustained because there was ratification, the authority of both can stand. For the fact of ratification by the court is ample excuse to purchasers searching the record for looking no further for defects. By the fact of ratification the court has cured all defects as to purchasers, and perfected the sale, and the purchaser may rest there. But when the court has for any reason not ratified and confirmed the sale, when it remains incomplete, and, especially in the case of sale of land belonging to a minor, liable to be set aside, when, also, it is in the power of the purchaser to obtain confirmation for the asking, can he be said to be a *bona fide* purchaser, being bound to know all these things under the rule in *Stewart v. Matheny*, if he accepts the void deed of the guardian, and by his own fault or neglect fails to secure the ratification of the court? That he may have paid a part or the whole of the

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purchase money can make no difference. *Tooley v. Gridley*, 3 Smed. & M., 493; *State v. Cox*, 62 Miss., 786; *Fearing v. Shafner*, *Ib.*, 791; *Brooks v. Kelley*, 63 *Ib.*, 616; *Pool v. Ellis*, 64 *Ib.*, 555; *Campe v. Saucier*, 68 *Ib.*, 278; *Alsobrook v. Eggleston*, 69 *Ib.*, 833; *Maynard v. Cocke*, 18 So. Rep., 374. After confirmation, the sale is in every respect as complete as if made by the parties in interest, instead of by the court, and will only be set aside for the same causes which will operate as between the parties. *Berlin v. Melhorn*, 75 Va., 639.

But, under the case last cited from this court, the purchaser of land of a minor before confirmation gets neither title nor any absolute right to obtain title. *Allen v. Martin*, 61 Miss., 78. And, because the guardian's deed expressly referred to the decree for sale as authorizing it, and that decree showed an absence of ratification by the court, the decree and deed together forming an indivisible unit in the chain of title, every subsequent purchaser was bound to take notice of the defect. *Stewart v. Matheny*, *supra*.

Especially were those who purchased after the removal of the guardian, on April 10, 1882, bound to take such notice, for, being, by their chain of title, put on inquiry as to the reasons why the sale was never confirmed, examination would have disclosed to them that the guardian was removed on a petition which showed that he had misappropriated a portion of the purchase money received by him at the very sale under which they claim. In this predicament were the purchasers at the sale by Birmingham's executor, which occurred on March 10, 1884, nearly two years after the removal of the guardian. From these parties appellees derive title to forty-four acres. The remaining sixty acres are owned by defendants as heirs of Birmingham, not as purchasers, and, as to this portion, they can in no event be classed as *bona fide* purchasers without notice.

In support of the right to recover for improvements, the case of *Pool v. Ellis*, 64 Miss., 555, will be cited by opposing

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counsel. We do not regard that case as authority for the recovery. It is true that, in that case, the chancellor allowed the purchaser, at an unconfirmed administrator's sale, to recover the value of his improvements, but neither in the court below, nor in this court, does there seem to have been any objection to the allowance. The case was decided wholly on other points; besides, the parties against whom recovery was had, acquiesced in the decision on the right of the purchaser to recover his improvements. And there seem insuperable difficulties in the way of adopting the view of the chancellor in that case. He held the purchaser in under contract of sale, and yet charged him with both rents and purchase money; but in fact he was in under a statutory proceeding which was a nullity unless conducted in accordance with the statute. *Stampley v. King*, 51 Miss., 728. And if defective, no equitable rights could arise; the purchaser got either the full legal title or none at all. *Young v. Lorraine*, 11 Ill., 624. Opposing counsel seems to apprehend that if the claim for improvements is rejected, appellant will still recover all the rents arising from the improvements. This fear is groundless, as, if the improvements are disallowed, so will be the rents to the extent that they arose from the improvements. *Tatum v. McClellan*, 56 Miss., 352.

The true measure of defendants' recovery for improvements, was not the cost of making or replacing them, but the enhancement in the value of the land by reason thereof. *Nixon v. Porter*, 38 Miss., 401, 416; *Wilie v. Brooks*, 45 *Ib.*, 542, 551; *Clark v. Hornthal*, 47 *Ib.*, 434, 476; *Massey v. Womble*, 69 *Ib.*, 347; *Bright v. Boyd*, 1 Story R., 478, s.c. 2 *Ib.*, 607; 1 Sedgwick Dam., p. 127, note *c*; Story's Eq. Juris., sec. 799; 3 Sutherland Dam., sec. 999; Cooley Const. Lim., top p. 478, 479 (5th ed.); *Brown v. Storm*, 4 Vt., 37; *McMurray v. Day*, 70 Ia., 67; *Fisher v. Edgington*, 85 Tenn., 27; *Pacquette v. Pickners*, 19 Wis., 235; *Fletcher v. Brown* (Neb.), 53 N. W. Rep., 577; *Wells v. Newson*, 76 Ia., 81; *Williams v. Vander-*

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bilt, 145 Ill., 238; *Breit v. Yeaton*, 101 Ill., 541; *Ebelmesser v. Ebelmesser*, 99 Ill., 541; *Woodhull v. Rosenthal*, 61 N. Y., 382, 396; *Willingham v. Long*, 47 Ga., 540; note to *Barrett v. Stradl*, 9 Am. St. Rep., 805; *Wetherell v. Gorman*, 74 N. C., 603; *Daniel v. Crumpler*, 75 N. C., 184; *Smith v. Stewart*, 83 N. C., 406; *Railroad Co. v. McCaskill* (N. C.), 4 S. E. Rep., 468; 6 Am. & Eng. Enc. L., 245aa; 10 *Id.*, 244; *Noble v. Biddle*, 81 Pa. St., *430; *Johnson v. Futch*, 57 Miss., 73, 80; *Childs v. McCoy*, 18 Ia., 261; *McCoy v. Grandy*, 3 Ohio St., 463; *Whitney v. Richardson*, 31 Vt., 300, 306; *Thomas v. Malcolm*, 39 Ga., 328; *Booth v. Vanarsdale*, 9 Bush (Ky.), 718.

T. H. Campbell, for appellees and cross appellants.

There can be no doubt of the defendant's right to the value of improvements, under the decision of this court in *Cole v. Johnson*, 53 Miss., 94, overruling *Learned v. Corley*, 43 *Ib.*, 687. The cases cited by counsel in support of the contention that defendants are not entitled to the value of the improvements made by them, because an examination of the chancery proceedings, in the matter of the guardian's sale, would have disclosed the defects which it is asserted rendered the title of the purchaser void, are cases where the record would have shown that the title the parties purchased was a life estate and not the fee, and comes directly under the rule announced in *Miller v. Palmer*, 55 Miss., 323, except the case of the *Gulf Coast Canning Co. v. Foster*, 17 So. Rep., and the case of *Alsobrook v. Eggleston*, 69 Miss., 833. The case of *Stewart v. Matheny*, cited (66 Miss., 21), expressly makes the distinction set out in the case of *Miller v. Palmer*, *supra*. The case of the *Gulf Coast Canning Co. v. Foster*, 17 So. Rep., 684, was decided on a different and familiar principle—that a party purchasing at a judicial sale must take notice whether or not the court had jurisdiction. The court in this case says: “An examination of the records of the federal court would have shown that it had no

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jurisdiction of the parties or the subject-matter." Surely it is not contended that the chancery court had no jurisdiction to decree a sale of the ward's land. In this case, too, there was no claim entered for improvements.

The case of *Alsobrook v. Eggleston*, *supra*, involved no question of improvements, and the court evidently was of the opinion that Eggleston knew of the invalidity of his title from his conduct, and the case was decided upon the theory that Eggleston, learning of the invalidity of the title, abandoned the purchase, as shown by his conduct in not recording the commissioner's deed, and in purchasing the interest of the other co-tenant, Payne. In other words, the facts proved that Eggleston had actual notice of the defective title conveyed by the commissioner. It is not even contended that defendants did not honestly believe that their title was good, and their entire conduct shows that they did so believe.

In the case of *Pool v. Ellis*, 64 Miss., 556, the court allowed the defendants for improvements, and this action of the chancellor was affirmed by the appellate court. In this case the sale to Pool was never confirmed, and, though he paid the purchase money to the administrator, the court held that this payment was to the agent of Pool. The purchaser himself was allowed for the improvements, and if, as contended by counsel, want of confirmation would render a purchase *mala fide*, so as to deprive him of the value of the improvements, then it seems this court would have so declared, but, on the contrary, it affirmed the action of the chancellor.

We come now to consider the remaining question raised by appellant on her direct appeal, which is as to the basis of ascertaining the value of the improvements to the lands. If we understand the position of opposing counsel, it is that the only mode of ascertaining the value of the improvements is to ascertain, at the time of hearing, the market or vendible value of the lands and the value of the lands in the condition they were without the improvements, and, subtracting the one from the

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other, thus obtain the value of the improvements. This court has not announced any definite rule on this question, but, in the case of *Massey v. Womble*, 69 Miss., 347, cited by the appellant, seem to leave the matter to be governed by the particular facts in the case. See *Johnson v. Futch*, 57 Miss., 80, 81, a case that ought to determine the question in favor of appellees.

Brame & Alexander, on the same side.

1. The statute as to profits and improvements in ejectment on its face excludes the idea that the enhancement of vendible value is alone to be allowed, else why provide that the jury shall "find the actual cash value of such improvements," etc.; why find the "value of the mesne profits and damages," unless it is to set them off against the improvements? It is true the jury is required to find also the "actual cash value of the lands without improvements," but this is to measure the sum to be paid by defendant in case plaintiff does not pay the excess, if any, of improvements over rents. The very verbiage and explicit directions of the statute exclude the idea that the enhancement of vendible value is to be the measure of defendant's allowance.

As stated by associate counsel, the case is controlled by *Johnson v. Futch*, 57 Miss., 73, which is the only case where our court has minutely passed on the whole matter of the character of the accounting where mesne profits are claimed on one side and improvements on the other in cases where one has purchased and improved in good faith. The same doctrine announced in this case is recognized in *Miller v. Ingraham*, 56 Miss., 510, and *Hudson v. Strickland*, 58 Miss., 186. The latter case allowed to defendant the value of the improvements placed on the land after suit filed so far as they had enhanced the value of the land or were necessary. *Johnson v. Futch* says: "The principle of the statute is more favorable to the defendant" than the old law.

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The case mainly relied on by appellant (and the only one on this point subsequent to *Johnson v. Futch*, which he cited) is *Massey v. Womble*, 69 Miss., 347. It will be seen, however, from the opinion and the statement of facts, that the court did not commit itself to the basis of accounting adopted, nor pass on it. It approved the result, or, rather, declined, in view of the facts, to disturb the result.

The case of *Clark v. Hornthal*, 47 Miss., 334, decided nothing. Only two judges sat in it, and they disagreed on the main point. It is not true that Judge Peyton said, in that case, that the "increase in valuation" is the measure of recovery. He cited a Kentucky case or two which so held, but he proceeded (page 479) to direct an account not of such vendible value, but "of the value of the improvements put by defendants on the land," and said complainant must pay them for "the money paid out and improvements, less the rent or profits."

Wilie v. Brooks, 45 Miss., 542, does not announce that the increase in the vendible value is to govern. The facts are not fully set out in the report of the case, but it is evident that defendant was claiming the cost of his improvements instead of the value, and Judge Tarbell says (page 551): "Complainant is not entitled to all the expenditures and disbursements, but to the enhanced value of the property," etc. As much as to say that, before recovering for an expenditure, it must be such as enhances the value of the land, *i. e.*, permanent and useful, and the reasonable value, not the cost price, is to govern. The opinion then adds that the rule is further stated in code 1857, wherein, if the improvements exceed the rents, etc., not the enhanced vendible value, but the "improvements" in excess of the rents, is to be a lien, etc. This case was not a decision on an accounting, but the opinion assumed to give direction for a future accounting.

The remaining case relied on by the appellant (*Nixon v. Porter*, 38 Miss., 401), is far from sustaining his contention. It recognizes the rule announced in *Johnson v. Futch*, for it

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denied plaintiff rents on the basis of the enhanced value of the land. If appellant can succeed in restricting us to the enhanced vendible value of the land, surely she cannot get rents on the enlarged basis. Without the improvements there would be no rents.

2. That defendants are entitled to be allowed for their improvements is not an open question. It is presumable that this court in overruling *Learned v. Corley*, 43 Miss., 687, as it did do in *Cole v. Johnson*, 53 Miss., 94, proceeded with due care, and earnestly considered the question here revived.

The cases of *Pass v. McLendon*, 62 Miss., 580, and *Stewart v. Matheny*, 66 *Ib.*, 21, are not in point. In those cases the life tenant, or one holding under him, improved his own property, and, not being chargeable with the rents, was held not entitled to improvements.

Argued orally by *J. B. Thompson*, for appellant, and by *C. H. Alexander*, for appellees.

WOODS, C. J., delivered the opinion of the court.

The sale of the lands in controversy by the former guardian of appellant, on April 26, 1879, was not only never reported to nor confirmed by the court under whose decree the same was made, but there is a total failure of evidence showing any attempt at compliance with the terms of sale prescribed by the decree. There is a recital, vague and inferential, in the guardian's deed to the purchasers at that sale, of his receipt of half the price bid from the purchasers, in cash; but this was before any report or confirmation of sale (there never having been, in fact, at any time, any report or confirmation, as already stated), and, under well-known rules of law in such cases, this half of the bid thus handed over in cash to the guardian, was merely a delivery to him as a depository of the purchasers. As to any payment of the deferred half of the price bid by the purchasers at that sale, the record is silent. The sale was made without

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compliance with the decree ordering it, and was never reported to or confirmed by the court. It was, therefore, void, and conveyed no title. With the fatal infirmity inhering in the conveyance taken by them, it cannot be pretended the purchasers were ignorant; and of the rottenness of this first link in the chain of title of the defendants, they are chargeable with notice. This deed from the guardian to the purchasers at the said sale, with the record of the proceedings of the court ordering it, and with the absence from that record of any report of sale by the guardian, and confirmation of it, would have shown, upon the most cursory examination, that the sale was void. The deeds of the guardian alone did not and could not confer title, but the decree of confirmation of the sale by the court was necessary. These deeds themselves, on their face, showed that something further than their recitals was necessary to be sought by an intending purchaser, and that this something else would be found in the decrees of the proper court, and the failure to seek this further information in the proceedings of the court, was such negligence as is inconsistent with a claim of title by a purchaser in good faith without notice. Without dwelling upon this point, we are of opinion that the court below very properly decreed Frances Hicks to be the owner of the land.

Two errors are assigned as grounds for reversal on the direct appeal, viz.: (1) The court erred in allowing defendants to recover for the value of improvements made by them on the land, and (2) the court erred in allowing defendants to recover the cost of such improvements, instead of the amount by which the same was shown to have enhanced the value of said land. We consider these in their order. In *Learned v. Corley*, 43 Miss., 687, this very question of the right of a purchaser whose title was derived through a sale, under a decree of court never reported and confirmed, to claim compensation for improvements by a claim of title honestly entertained, was considered and determined agreeably to the view upon which appellant's first assignment of error rests. The reasoning of the court in that

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case was largely upon the purpose and effect of registry laws, and the curious result seems to have been reached of imputing *mala fides* to one whose claim for improvements was derived from a sale never confirmed, though the claim was honestly made and the improvements created in ignorance of the invalidity of his title. We agree with the able counsel for appellants, that the decision of *Learned v. Corley* practically denies the sufficiency of actual good faith and honest ignorance of defects to support a claim for improvements where the claimant's title papers disclosed the invalidity of his title itself to the land. But the learned counsel frankly concedes that in *Cole v. Johnson*, 53 Miss., 94, the case of *Learned v. Corley* is expressly overruled. The concession, however, is thought by appellant's counsel to be harmless, because of the supposed mistake of fact said to be apparent in *Cole v. Johnson*. It is said by counsel that *Cole v. Johnson* rests, in part, upon the mistaken assumption that there had really been a confirmation of the sale in the case of *Learned v. Corley*. Repeated examinations of that case satisfy us that the very able judge who delivered the opinion in *Cole v. Johnson* was not misled by any misapprehension of fact. Said Chalmers, J., in that case: "The doctrine thus enunciated (in *Learned v. Corley*) was manifestly an *obiter dictum*. . . . The court had already declared that the claim for improvements could not be maintained, because there was no demand for mesne profits by the plaintiff; and this view was decisive of the case. All that was subsequently said, therefore, is entitled only to such persuasive force as its own intrinsic merits demand; and, after mature reflection, we must announce our dissent from so much of the opinion as holds that the value of permanent improvements is not recoverable, where the defect in the title is discoverable by an examination of the records of the county."

Having thus shown that what was said in *Learned v. Corley* on this proposition was dictum, and having declared the dissent of the court from the erroneous view embraced in that

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dictum, Mr. Justice Chalmers then proceeds briefly, but unmistakably and unanswerably, to overwhelm the erroneous proposition asserted in *Learned v. Corley*. The opening sentences of his argument disclose the impregnable ground upon which it rested: "The requirement that the party making improvements 'shall claim the premises under some deed or contract of purchase made in good faith,' must mean nothing more than an honest belief on his part that he is the true owner. The expression, 'some deed or contract of purchase,' of itself negatives the idea that it is the true title which he must have, and plainly indicates that what the law calls 'color of title' will be sufficient. Indeed, if he were the purchaser of the true title, there would be no occasion for him to invoke the protection of the statute, since he could never be dispossessed, and hence could never be compelled to make claim for improvements. But does not the rule that he shall be denied them if by an investigation he could have discovered the defect in the title, practically abrogate the statute?" And then follows the opinion, based upon inexpugnable reasoning, which had been supposed, until the oral presentation of the views of appellant's counsel at bar, to have forever, in this state at least, settled adversely the contention that an occupant of land under color of title, and in ignorance of any outstanding paramount title, and in the absence of any circumstances showing that he had come to suspect the validity of his title, can be denied compensation for improvements by an imputation of *mala fides* because of a failure to examine the public records of the county.

But *Cole v. Johnson* has been cited with approval and relied upon as settled authority over and over and over again by this court. *Gaines v. Kennedy*, 53 Miss., 103; *Morgan v. Hazlehurst Lodge*, 53 Miss., 665; *Emrick v. Ireland*, 55 Miss., 390; *Holmes v. McGee*, 64 Miss., 129; *Stewart v. Matheny*, 66 Miss., 21. In the last name case, *Cole v. Johnson* and *Puss v. McLendon*, 62 Miss., 580, are both cited, and both approved and adhered to, and are shown not to be in conflict. Said Judge Campbell, in *Stewart*

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v. *Matheny*: “In *Cole v. Johnson*, 53 Miss., the expression, ‘good faith,’ employed by our statute on the subject of the right of the defendant in ejectment to claim for improvements, was held not to exclude the claim of one who had purchased land at a sale under a decree of the probate court, and paid for it and improved it, believing his title to be perfect. In *Pass v. McLendon*, 62 Miss., one who had purchased land from a tenant for life, who held under a will of record in the county in which the land lay, in ignorance of the fact that his vendor did not have the fee, and believing that he acquired the fee, was not entitled to pay for improvements made by him during the existence of the life estate. We adhere to both cases. One might well be excused from the requirement of forming a correct opinion as to the validity of a sale of land under the decree of the probate court, under the view taken of that court by the appellate court, and was not chargeable with bad faith or gross negligence (its equivalent) for believing, until informed to the contrary, that a sale made by a decree of the court intrusted with jurisdiction over the subject and parties, was regular and conferred title.

“But the purchaser of land must be conclusively presumed to know what appears on the face of the title papers under which he claims, and this presumption cannot be rebutted or explained away. He must take notice of his title as being to a life estate or a fee, where that title is plainly disclosed by the records accessible to him, and not to examine which, ordinarily, would be gross negligence.”

The defendants were clearly entitled to compensation for improvements, as well as taxes, under an unbroken line of decisions in this state, beginning with *Cole v. Johnson*, they claiming the lands on which the improvements were put under some deed acquired in good faith.

We are thus brought to consider the measure of the recovery for improvements, the second assignment of error being that the court mistook the law in permitting the defendants to re-

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cover the cost of the improvements, instead of the amount of the enhancement in value of the lands by reason of the improvements. This assignment is well taken, and the question raised by it is not one of first impression with us. See *Nixon v. Porter*, 38 Miss., near bottom of page 416, where it is said that the defendant is to be allowed for the value his improvements have added to the land. See *Willie et al. v. Brooks*, 45 Miss., p. 551, where it is declared that the complainant is entitled only to the value of the property as enhanced by the additions and ameliorations. Payton, C. J., in his opinion in *Clark et al. v. Hornthal et al.*, 47 Miss., 478, approves the rule of measuring the liability for improvements by the increase in the vendible value of the land. And, in *Mussey v. Womble*, 69 Miss., this court declined, on all the facts of that case, to disturb the decree of the court below, based on the report of its commissioner, which allowed the defendants credit for the enhanced vendible value of the land, and for taxes paid, and interest thereon, and charged them with the rental value of the land during their possession, and interest thereon.

The report of the commissioner in the case in hand shows that the present value of the lands without the improvements is \$500, and with the improvements \$1,500; and yet, by the decree of the court below, the improvements, exclusive of taxes paid by defendants, are valued at \$1,600, which makes the improvements alone worth \$100 more than the land and improvements together. Manifestly, the sum of \$1,600 is the amount expended in making the improvements, or estimated to be necessary to replace the improvements if they were taken away, and not the amount of the enhanced vendible or rental value of the lands. And this enhanced vendible or rental value is synonymous with the statutory words "actual cash value of such improvement." The enhanced vendible or rental value means nothing more or less than the actual cash value of the improvements, if they were sold for their fair value, as they affect the vendible value of the land.

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The case of *Johnson v. Futch*, 57 Miss., is perfectly reconcilable, on its facts, with the cases already cited. We thoroughly approve the rule laid down in the last named case, viz.: That the value of improvements should be assessed on a basis co-extensive in time with the estimate of rents and profits which they contributed to produce, so as to allow the defendant for all his improvements of which the plaintiff recovers the benefit; but this does not mean that the defendant is to be allowed extravagant expenditures, or even necessarily actual cost for all the improvements he may have seen fit to place on the land, or that he is entitled to the cost of replacing such improvements if they were regarded as not on the land. The defendant is to be allowed for improvements to the amount of the enhanced value of the lands, regard being had to the natural and proper uses for which the land is fitted and to which it is devoted.

It follows that the court below erred in allowing defendants the cost of the improvements instead of allowing them the amount of the enhanced value imparted to the land by reason of the improvements, and for this error the decree will be reversed.

On the cross appeal, we have to say that we have already considered the action of the court below in declaring Frances Hicks to be the owner of the land, and it is unnecessary to repeat what has been said already. We see no error in the action of the court in any other particular. Reversed on direct appeal, and affirmed on cross appeal.

Reversed and remanded.

T. H. Campbell and *Brame & Alexander*, for appellees, filed separate suggestions of error, insisting that if in the accounting the court below erred against appellant in allowing the cost value of the improvements, it also erred against the appellees in charging the increased rents resulting from the improvements; and that if there was a reversal of the appeal on the one account, there should also be one of the cross appeal on

Response to the suggestion of error.

the other. In support of their contention they cited *Staton v. Bryant*, 55 Miss., 261; *Miller v. Ingram*, 56 *Ib.*, 510; *Tatum v. McClellan*, *Ib.*, 352.

WOODS, C. J., delivered the following response to the suggestion of error.

In the opinion of this court, in which error is now suggested, we held that the defendants below—appellees here—were to be allowed the sum of the enhancement in value of the lands, imparted to them by reason of improvements made upon them by defendants, and not the sum of the cost of making such improvements, nor the sum necessary to replace the improvements if they were considered as removed and not on the lands. The correlative of this rule was also bound up in the former opinion delivered by us, to wit.: that the defendants were properly chargeable with the enhanced rental value of the lands after the improvements were made or placed upon them. The full rule is, allowance to defendants for improvements to the extent of the enhanced vendible value of the lands imparted by such improvements, and liability for enhanced rental value imparted by the same improvements. This rule is so just, so reasonable, so fair to both parties, that we must adhere to it.

The suggestion of error is based upon a total misapprehension of the scope and effect of the former opinion, in so far as it assumes that the enhanced vendible value of the lands by reason of the improvements, was either found by the court below or passed upon at all by us. The decree of the court below found nothing and settled nothing as to the enhancement in the vendible value of the lands imparted to them by the improvements, and, necessarily, our former opinion does not even refer to this question. On the return of the case now to the court below, that court will examine and determine, for the first time, this very question.

Suggestion of error overruled.

Brief for appellants.

74	484
80	521

G. W. WALTON ET AL. v. R. F. LOWREY.

1. STATUTE OF FRAUDS. *Standing timber.*

A parol agreement authorizing the cutting of standing timber on lands, is within the statute of frauds.

2. LICENSE. *Revocable.*

A sale of growing timber by parol is a license, and authorizes an entry upon the land, but the same is revocable at the will of the seller.

FROM the circuit court of Covington county.

HON. A. G. MAYERS, Judge.

The facts are stated in the opinion of the court.

Instructions numbers one and three, referred to in the opinion of the court, were as follows:

“1. The court instructs the jury for the defendant that if they believe, from the evidence, that Walton was paid for the timber cut by Lowrey, then they should find for the defendant.”

“3. The court instructs the jury for the defendant that if they believe, from the evidence, that Lowrey obtained leave and license to cut the timber, and paid for the same, then they should find for the defendant.”

McIntosh & Mounger and *J. F. N. Huddleston*, for appellants.

The verbal sale of the standing timber was within the statute of frauds, not being evidenced by any writing, and was revocable, and was revoked. Section 2434, code 1892; *Ib.*, § 4225; *Harrell v. Miller*, 35 Miss., 700; Am. & Eng. Enc. L., vol. 13, p. 1020; *Gothard v. Flynn*, 25 Miss., 58; *McKenzie v. Shows*, 70 Miss., 388. It was an incumbrance upon the homestead, and, as such, was void. Code 1892, § 1983; *Mc-*

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Kenzie v. Shows, supra. Even if a license to enter were given, it was revocable, and it was revoked, as shown by the evidence. Am. & Eng. Enc. L., vol. 13, p. 539, *et seq.*; *Wood v. Ledbetter*, 13 M. & W., 837.

Henry Mounger, on same side.

The three propositions involved are these: (1) Will a parol sale of standing trees operate as a license to cut the trees? (2) Will a parol sale of timber on the homestead by the husband alone operate as a license to cut the trees? And (3) will such parol sale, if it operate as a license, bind the husband so that he cannot revoke it? The court below, it is respectfully submitted, decided all three of the propositions erroneously. As to the first one, see Am. & Eng. Enc. L., vol. 13, p. 543; as to the second one, see *McKenzie v. Shows*, 70 Miss., 388; as to the third one, see code 1892, § 1983. Surely a license created by parol must be revocable, or else the statute of frauds is completely circumvented.

Watkins & Travis, for appellee.

A trespass on land is an unlawful entry upon land. It implies a wrongful, an unlawful, act. The facts of this case show conclusively that appellee has been guilty of no such act. What he did was done with appellant's permission—a permission bought and paid for, and which was therefore irrevocable. We invoke no new principle. The law in support of our contention is as old as the statute of frauds itself. It was clearly recognized, defined and applied by this court in the case of *New Orleans, etc., R. R. Co. v. Moya*, 39 Miss., 374, and we confidently rely on that case as decisive of this in appellee's favor.

STOCKDALE, J., delivered the opinion of the court.

This cause was instituted in justice of the peace court in Covington county, and judgment rendered for plaintiffs, and defendant appealed the cause to the circuit court of said county,

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and, at the July term, 1896, thereof, a trial was had, and a verdict and judgment for defendant, from which plaintiffs appealed to this court.

In July, 1891, defendant Lowrey made a parol agreement with G. W. Walton for the sale by Walton, and purchase by Lowrey, of the standing timber on 120 acres of land, a part of northwest quarter, section three, township six, range fifteen west, situated in Covington county, Mississippi, and which northwest quarter is the homestead of Walton and his wife, who occupied it as such, and Lowrey paid Walton the agreed price, \$110, and was to take the timber off within two years. Before the expiration of the two years, having failed to take the timber off, Lowrey made another parol agreement with Walton for an extension of time for two years longer, as he claims, which Walton and wife claim was for one year, and paid \$10 for same. Before the expiration of that two years, Lowrey procured another extension of time from Walton alone indefinitely, at the rate of \$10 per year, and paid on that \$5.85. To that first agreement, the wife of Walton (Mary Walton) assented and acquiesced in the first extension, but refused to consent to any further agreement about the timber. All of these agreements were verbal; no writing of any character entered into any of them. Some timber was cut during the first extension. On August 1, 1895, Lowrey, hearing that Walton and wife were dissatisfied, went to see them about cutting the timber, and Walton and wife both told him he had had time enough, and forbade his cutting any more timber upon their land. Lowrey went to cutting the timber, and Walton went to where he was cutting and forbade him again, but Lowrey cut eighty pine trees after he was forbidden to cut any more by both Walton and wife. They brought suit.

The parol agreement and the first extension, to which the wife assented, operated as a license to Lowrey to enter upon the land without committing a trespass, but did not authorize him to cut trees; but when she refused to assent to further extension,

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and she and her husband forbade Lowrey to cut timber, the license to enter terminated, and, in cutting standing timber on Walton's land after that, Lowrey was a trespasser, and could not set up his parol agreement in defense of plaintiffs' demand. No higher estate in lands than a lease for one year (which does not authorize the cutting of timber except for repairs) can be conveyed from one to another by parol, and, when it is established that growing timber is a part of the realty, this controversy will be terminated.

It is laid down in *Harrell v. Miller*, 35 Miss., 700, that, "when the statute of frauds speaks of 'lands, tenements, and hereditaments,' it must be understood to refer to them in such sense as the terms imported at common law, and, according to the principles above stated in that case, growing trees must be considered as pertaining to the soil and embraced by the terms of the statute." To permit a parol sale of growing timber, and authorize the vendee to enter and cut and remove it, would be to invite the same evils that the statute of frauds was intended to remedy and prevent. To convey the growing timber is to convey an interest in the land, and a parol sale of the timber is therefore void, and could not be enforced even if all the purchase money had been paid. After the two recent matured decisions of this court—*McKenzie v. Shows*, 70 Miss., 388, delivered by the present chief justice, and *Nelson v. Lawson*, 71 Miss., 819, by Chief Justice Campbell, both referring to and recognizing and reannouncing the doctrine laid down in *Harrell v. Miller*, decided in 1858, and practically acquiesced in by the bar of the state—it must be regarded as the definitely settled law in this state that parol agreements for the sale of growing timber, to be secured and removed from the land in future, are void, and confer no rights on the purchaser. "It is conceded to be law that, if the contract was executory, it conferred no right, because not in writing," says Chief Justice Campbell, in *Nelson v. Lawson*, referring to *Harrell v. Miller*.

Opinion of the court.

We have examined all the authorities cited by counsel on both sides, and many others, but, in view of the adjudications above referred to, we deem it unnecessary to quote further authorities beyond our own state. Counsel for appellees insist that the principle announced in *Railroad Co. v. Moyer*, 39 Miss., 374, is applicable here. In that case suit was brought by plaintiff's intestate to recover damages for constructing a railroad through his land, he having made a verbal agreement giving the railroad company the right of way. The court held that the verbal contract operated as a license to enter upon the land, and therefore defendant was not guilty of trespass. But the court also said in that opinion that the verbal agreement set up in that case was not a contract at all, and never was binding as such upon plaintiff's intestate; "but it was a mere license or permission, revocable at any period, unless where such revocation would operate as a fraud or injury upon the party to whom it was granted." The railroad company had entered on the lands of the owners, and completed the work without any revocation of the license. In the case in hand, appellants, acting upon the principle laid down in the case cited—that the verbal agreement was a mere license or permission to enter upon their lands, and not binding as a contract upon anybody—revoked the license; and both Walton and wife had forbidden him to cut timber upon their lands, which lands were part of their homestead. In fact, the wife had not assented to, nor in any way countenanced, the second extension under which Mr. Lowrey claimed the right to cut the eighty trees sued for. Wherefore appellee was without authority of law to either enter upon the lands of appellants, or to sever and remove growing timber therefrom, and may be held to liability as a trespasser for the eighty trees sued for in this case.

It will not be necessary to discuss the instructions that were refused, inasmuch as the instructions given at the instance of defendant were clearly erroneous, and, for that reason, the cause must be remanded; particularly the second instruction

Statement of the case.

for the defendant, which announces the law to be that "a parol license is sufficient to authorize defendant to cut and remove timber from the land of another." The adjudications in this state do not sustain, but are directly to the reverse of, that proposition. The giving of instructions No. 1 and No. 3 was also error. It follows, therefore, that the motion for a new trial ought to have been sustained, and a new trial granted.

The judgment of the court below is reversed, a new trial granted and the cause remanded.

L. D. DAY ET AL. v. F. H. HARTMAN.

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1. JURISDICTION. *Constitution 1890, § 147.*

If the chancery court overrules a demurrer to a bill in equity raising the question of its jurisdiction to subject specific property to the payment of a judgment at law, the record of which judgment has been destroyed, the supreme court cannot, under the constitution, § 147, review such question, there being no other error found in the record.

2. ERROR. *Sale of property as subject to waste. Code 1892, § 516.*

That the sheriff, in the progress of the cause, wrongfully sold property, without an order of court, as liable to waste or decay, under § 516, code 1892, is not cause for reversing the final decree in the case.

FROM the chancery court of Lincoln county.

HON. H. C. CONN, Chancellor.

Hartman obtained a judgment in the circuit court against L. D. and B. O. Day, which was duly enrolled. The record of the judgment and its enrollment being destroyed by fire, the appellee filed his bill in chancery setting up the facts and averring that defendant, Hardy, had sold the Days a tract of land, valuable for its timber; that the Days had erected a steam saw-mill on the land, and were converting the timber into lumber

Brief for appellants.

and shipping it out of the state; that they had no property subject to execution, except their interest in the land, the mill, lumber on hand, and a few oxen; that the land was subject to a purchase money lien for a small balance due Hardy; and that Daniel & Willoughby, defendants, claimed an interest, the character of which was unknown to complainant, in the property, but such interest was averred to be subject to the judgment lien. The prayer was for an injunction restraining the removal of, and for a writ of sequestration for, the personal property and for a sale of the interest of the Days in the lands and personalty to satisfy the judgment against them. The bill proceeded upon the idea that because of the destruction of the records an execution on the judgment at law could not be obtained.

All the defendants, except Hardy, as to whom the suit was dismissed, demurred to the bill. The Days filed a general demurrer, and Daniel & Willoughby filed two demurrers—a general and a special one—raising the question of the jurisdiction of the court. The general demurrers were overruled, the special demurrer of Daniel & Willoughby was sustained as to the personal property, but overruled as to the real estate. Daniel & Willoughby disclaimed interest in the land. The Days answered, denying, substantially, all of the averments of the bill, and they claimed some of the property as exempt. During the progress of the cause some lumber which had been seized was sold by the sheriff as liable to immediate waste or decay, under § 516, code 1892, without an order of court to do so. The decree was in Hartman's favor, and the Days appealed.

A. C. McNair, for appellants, L. D. and B. O. Day.

The demurrer of my clients should have been sustained to the bill. The complaint was not good on the idea of requiring an adjudication of the priority of liens, for several reasons: (1) It is not alleged or shown in the bill that the Hardys had a

Brief for appellants.

vendor's or other lien on the land. For aught that appears, the lien may have been waived. (2) Judgment liens are subordinate to all equities. They are general in their nature, while vendor's liens are specific. In equity, judgment liens are inferior to vendors' liens. Pomeroy's Eq. Jur., secs. 685, 720; *Foute v. Fairman*, 48 Miss., 536; *Cayce v. Stovall*, 50 Miss., 396.

The lien of a vendor, even when not reserved by any express language, is more than a mere equity. It is an equitable interest *in rem*, and entitled to preference over all subsequent equitable interests of no higher nature (*Rice v. Rice*, 2 Drew, 73), while a judgment lien is neither a *jus in re* nor a *jus ad rem*. It is not a property in the thing on which it exists, nor does it constitute a right of action for the thing. It is a mere charge on the thing, which can only be enforced by taking it into execution. *Dozier v. Lewis*, 27 Miss., 679.

The bill is not good as one for the removal of clouds on title:

1. Hartman is neither the legal or equitable owner of the land, but simply a judgment lien holder, without interest in the land.

2. The bill is not a creditor's bill in the sense that it seeks cancellation of fraudulent conveyances in aid of the exercise of jurisdiction on that line. If it appeared that the alleged cloud was cast on the title of the land by means of a fraudulent conveyance by the owner, to defeat his creditors, then it might, with some show of reason, be claimed that the bill is maintainable. No such case is presented, however.

3. It is shown that the judgment lien is prior, in time, to the claims of Daniels and Willoughby, and that the alleged claims cannot, in the nature of things, be clouds on the title; nor is the character or nature of the claims or clouds shown. In truth, it is averred that the judgment lien is superior to defendants' claims.

The destruction of the judgment record did not impair its efficiency; neither was the authority of the clerk of the circuit

Brief for appellants.

court to issue the execution on the judgment, or that of the sheriff to enforce it, impaired, in the least, by the loss of the judgment record. It was the evidence that was destroyed, and not the judgment. Lord Coke says that a judgment is the "very voyce of law and right." It is the decision or sentence of the law, pronounced by a court, or other competent tribunal, upon the matter contained in the record. By the loss, the jurisdiction of the circuit court was not divested, nor was jurisdiction thereby conferred on the chancery court to enforce the judgment of the circuit court. Freeman on Executions, sec. 18, and authorities cited in the note. If the clerk of the circuit court refused to issue the execution, appellee had his remedy at law by mandamus or otherwise. The chancery court did not have jurisdiction to substitute the lost record. Freeman on Judgments, sec. 89a; *Keen v. Jordan*, 13 Fla., 327; *Fisher v. Seivres*, 65 Ill., 99; *Pomeroy's Eq. Jur.*, sec. 827, and authorities there cited.

This case is not within sec. 147, constitution 1890. There is a valid, subsisting judgment in the circuit court, a court at law, which could be enforced in that court. There was authority vested in the clerk of the circuit court to issue execution, and in the sheriff to enforce it and collect the money from the very property in litigation. The whole matter was of common law jurisdiction. The framers of the constitution could never have intended, in such case, to divest the common law court of its power and jurisdiction to enforce its own judgment, and confer it on the chancery court. Such a construction would constitute the chancery court a court of appeal from the circuit court. Section 147, constitution, manifestly applies only to subject-matters of which no court has, at the time, taken or acquired jurisdiction, and not to cases like the one in hand. It must be conceded that the destruction of the record did not vest the chancery court with jurisdiction, either to substitute the lost record or to enforce the judgment.

Brief for appellee.

R. H. Thompson, for Daniel & Willoughby, who were notified to join in the appeal or be severed, etc.

While my clients have but little interest in this case, the decree of the chancery court being practically in their favor, I will say that their general demurrer ought to have been sustained. The defects in the bill are ably pointed out by the counsel of the Messrs. Day. Let me urge upon the court, however, that section 147, constitution, ought not to prevent a reversal. That section, by its terms, applies only where there has been an "error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction." It does not and cannot apply to a question of a court's right to hear and determine a cause arising from the fact that some other court first acquired jurisdiction of the subject-matter. The constitution was never intended to obliterate, or encroach upon, the rule that the court which first acquires jurisdiction of a cause will retain it to the exclusion of all other courts. No argumentation can ever obscure the fact that the bill in this case is an effort to enforce a judgment of the circuit court by the aid of the chancery court alone upon the ground that the record of the judgment is destroyed—this, and nothing more.

Cassedy & Cassedy, for appellee.

Section 147 of the constitution settles the question as to the jurisdiction of the chancery court on appeal, and also the demurrers overruled. 70 Miss., 571; 71 *Id.*, 438. The brief of counsel of the Days shows that there were several grounds upon which the court below may have claimed jurisdiction. If the lumber sold for too little, or was unlawfully sold by the sheriff, we cannot see how a reversal of this decree can be asked on that ground. If the writ of sequestration issued properly, and the court did not err in subjecting the property to the judgment lien and ordering it sold to satisfy said judgment, then the wrongful act of the sheriff cannot be held as error of the court.

Statement of the case.

WHITFIELD, J., delivered the opinion of the court.

We cannot, on appeal, disturb the decree overruling the demurrers, on the ground that the chancery court had no jurisdiction. Const. 1890, sec. 147; *Cazeneuve v. Curell*, 70 Miss., 521. The claim as to the exempt oxen seems not to be insisted on. The answers disclaim ownership, and the proof supports the answers. Besides, the bill averred L. D. Day to be the owner of three oxen, and B. O. Day to be the owner of six yoke of oxen, and the decree only directed the sale of four yoke of oxen.

Whether, in the absence of any proof, the lumber in this case could be held subject to "waste and decay," and "expensive to keep," within the meaning of § 516, code 1892—as was held not to be true of railroad cross-ties in *Goodman v. Moss*, 64 Miss., 303—need not, as matter of law, be here declared; for the undisputed testimony shows it was not subject to "waste or decay," or "expensive to keep." But, clearly, no error whereon to reverse the decree of the court, which did not order the sale, can be predicated of the independent and illegal act of the sheriff in making the sale. Appellants' remedy as to that was ample against the sheriff.

Affirmed.

T. T. BIDDLE v. GEORGE C. PAINE.

APPEAL. Attachment for rent. Amount in controversy. Code 1892, § 85.

Upon an appeal to the supreme court from a judgment of the circuit court, in favor of a landlord, in an action of replevin by the tenant for property distrained for rent, begun in a justice's court, the amount in controversy is determined by the rent due, as adjudged by the circuit court, and not by the value of the property seized.

FROM the circuit court of Monroe county.

HON. NEWMAN CAYCE, Judge.

Motion by appellee to dismiss the appeal.

Paine sued out an attachment for rent, before a justice of the peace, claiming thirty-three dollars as due him from the tenant,

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Brief for the motion.

Biddle. The distress warrant was levied upon two hundred bushels of corn, valued in the aggregate at more than fifty dollars, and eighty bushels of cotton seed. The tenant replevied the corn, and filed his statutory (§ 2522, code 1892) declaration therefor before the justice of the peace who issued the attachment. Paine, the landlord, filed an avowry. A trial was had before the justice of the peace, which resulted in a judgment for the tenant, Biddle. Paine appealed to the circuit court. During the progress of the case in the justice's court, Biddle began, before the same justice of the peace, a proceeding under § 2517, code 1892, for double damages, because of the seizure of the cotton seed, and recovered therein a judgment, against Paine and his sureties on the attachment bond, for seventeen dollars, and from this judgment too an appeal was prosecuted to the circuit court.

A trial was had of the statutory replevin in the circuit court, which resulted in a judgment in favor of Paine, the landlord, fixing the rent due at thirty-three dollars, as stated in the opinion. The record does not affirmatively show what disposition, if any, was made of the suit for double damages for seizing the cotton seed. Biddle, the tenant, appealed to the supreme court, where a motion was made by Paine to dismiss the appeal. It is provided by § 85, code 1892, that appeals may be taken from the circuit court to the supreme court, in cases originating in justice courts, where the amount in controversy exceeds the sum of fifty dollars.

Gilleylen & Leftwich, for the motion.

The amount in controversy is but thirty-three dollars. This is the sum for which the writ was sued out, and the judgment of the court is for the same amount. Under repeated construction of § 85, code 1892, which regulates appeals to this court, in cases originating before justices of the peace, there can be no doubt of the fact that the case should be dismissed. *Jackson v. Whitfield*, 51 Miss., 202; *Ward v. Scott*, 57 Miss., 826; *Davis v. Holberg*, 59 Miss., 362; *Kiernan v. Germaine*, 62

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Miss., 75. This court has construed the words, "the amount in controversy," to mean the principal of the demand sued for, excluding interest and costs. *Jackson v. Whitfield*, 51 Miss., 202.

Clifton & Eckford, against the motion.

The real judgment in this case appealed from is that "the landlord recover from T. T. Biddle, and James McConnell, the surety on his replevin bond, two hundred bushels of corn, or its value, sixty dollars." The balance of the judgment entry is but an incident to the main thing here adjudicated, and this incident is put in the alternative. That which measures and fixes the liability of these appellants is the judgment entry for two hundred bushels of corn, or its value, sixty dollars. One of the best tests to apply in determining this question is to ascertain how much money it will take to pay off and extinguish the judgment. *Ward v. Scott*, 57 Miss., 827. Apply this test, and the solution is easy. The incident here, the alternative obligation, the limitation upon the judgment, is "to an amount sufficient to pay said thirty-three dollars and costs." We call the court's special attention to the costs. Of course, we know that the item of costs cannot be used or estimated to make the amount over fifty dollars. But we are compelled to pay the entire sixty dollars, provided the costs, added to the thirty-three dollars, amount to so much. The judgment can only be reduced provided the two sums amount to less than sixty dollars. Now, if you cannot add the costs in order to make the amount over fifty dollars, then, on the same principle, you cannot subtract the cost in order to reduce the amount. The certified bill of the costs shows that the two amounts exceed fifty dollars.

WHITFIELD, J., delivered the opinion of the court.

The question for decision on this motion is, what is the test of the jurisdiction of this court, on appeal from a judgment in replevin by the tenant against whom the landlord has dis-

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trained—the value of the property fixed by the judgment, or the amount of the debt distrained for as so fixed? The action for statutory damages by the tenant, when no rent is due, provided by § 2517, code of 1892, is a separate and distinct suit from this replevin suit, the damages in which latter suit are the usual damages in such suits, and are provided for by § 2522. No aid, therefore, can be had on the notion that the \$17 statutory damages can be added to the \$33 rent due. The replevin, too, was for corn; the damages for alleged illegal sale of cotton seed never replevied. The judgment—the test for us—is on a verdict finding \$33 due on rent, and is itself that the landlord, the avowant, recover of the tenant, plaintiff in replevin, and his sureties the corn, or its value, \$60, to an amount sufficient to pay the said \$33 rent, etc.

It is true the replevin is the only suit, the distress warrant being returnable into no court, being process in the nature of execution, and that when the tenant gives bond “the attachment is discharged, and the proceeding becomes an action of replevin.” *Towns v. Boarman*, 23 Miss., 186. It is also true that the tenant becomes plaintiff, is the “actor” (*Marey v. White*, 53 Miss.), and the landlord the defendant, though, on the issue of rent due the statute puts the burden of proof on him and gives him the opening and close.

But, as pointed out in *Marey v. White* and *Towns v. Boarman*, *supra*, this is unlike the ordinary action of replevin. There the value of the property is the test of jurisdiction as to where the suit shall be brought; here (§ 2518, code 1892), an alternative test is provided—the value of the property or the amount distrained for. There not guilty is the only proper plea; here it is an improper plea, the statute making *non cepit*, or that the goods were rightfully seized, etc., the only allowable pleas. Here, the plaintiff having bonded, and the landlord winning, the jury find merely that the rents and supplies were due, and the distress rightfully made; there they find the defendant entitled to the possession of the property or its value,

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and, the judgment is that the plaintiff restore to the defendant the property, or pay him its value and damages (§ 3727, code 1892); here, that the landlord recover from the obligors in the replevy bond the property, or its value to an amount sufficient to pay the sum found due for rent or supplies, and if the property be not sufficient, then that execution go against the tenant for the residue. There the plaintiff in replevin sues for the recovery of the property, where he has some lien to be satisfied, and, if he recovers, the property is awarded to him, to be dealt with according to the terms of the lien, by contract or otherwise. Here the landlord, who has the lien, does not deal with the property, if recovered, himself, but "it is sold to satisfy the judgment" by the sheriff, and if it does not satisfy it, execution runs for the residue against the tenant. Indeed, it is expressly declared, in *Towns v. Boardman*, 23 Miss., 188, that "in this proceeding the real subject of inquiry is, whether any rent (or supplies now) is due."

The subject is not free from difficulties, but we think the view which best harmonizes with the reason and spirit of the statute providing this peculiar replevin—considering its total unlikeness to the ordinary action of replevin—is that which prescribes, as the test of our jurisdiction on appeal—where the case originated before a justice of the peace—the amount distrained for as fixed by the judgment of the court below (§ 85, code 1892). The verdict here is for thirty-three dollars rent, and nothing more. The judgment appealed from is that the landlord recover the corn, or its value, sixty dollars, to an amount sufficient to pay said thirty-three dollars, etc. This is an ascertainment that the "amount in controversy" (§ 85, code 1892), was thirty-three dollars, and, the case having originated in a justice court,

The motion is sustained.

Statement of the case.

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W. L. CLAYTON, ADMINISTRATOR, v. JOHN CLARK,
EXECUTOR, ET AL.

PAYMENT. *Agreement to accept lesser sum than debt in satisfaction.*

The acceptance from the maker by the payee of a note, of a sum less than the amount due, with an agreement that it is received as full satisfaction, accompanied by the surrender of the note, extinguishes the entire debt. *Jones v. Perkins*, 29 Miss., 139; *Pulliam v. Taylor*, 50 Miss., 251, in so far as they announce the contrary, and *Burrus v. Gordon*, 57 Miss., 93, overruled.

FROM the circuit court of Lee county.

HON. NEWMAN CAYCE, Judge.

Appellant's intestate instituted this suit seeking recovery on a promissory note for \$2,789, less a credit of \$1,000, against the appellees, the surviving makers of the note, and the executor of one of them who had died. The declaration itself showed that, upon payment of the \$1,000 for which credit was given, by R. C. Clark, one of the makers, the note was surrendered to him by the payee. The defendants filed three pleas. By the first one it was averred that about the time of the maturity of the note the payee of the note transferred and assigned the same to R. C. Clark, one of the makers; by the second, a like transfer and assignment was pleaded, and it was averred to have been so transferred for a valuable consideration; and by the third plea a like transfer and assignment was stated, and it was averred to have been made in consideration of the \$1,000 paid by R. C. Clark to the payee.

The original plaintiff having died, the suit was revived in the name of the appellant, his administrator, who demurred to each of the pleas, assigning as causes of demurrer, in various forms, that the pleas only amounted, in effect, to claims of payment of \$1,000 on a note for a much larger sum, and that credit was

Brief for appellees.

given for the \$1,000 by the declaration. The demurrer was overruled, and from the judgment rendered for the defendants the plaintiff appealed.

W. L. Clayton, for appellant.

The payment of about two thousand dollars less than the amount due on the note, does not discharge the note, no other or different consideration being alleged. This is the rule in all the courts, both in England and America. I refer to some of the authorities. *Fitch v. Sutton*, 5 East, 230; *Boyd v. Hitchcock*, 10 John., 76; *Pulliam v. Taylor*, 50 Miss., 251; *Jones v. Perkins*, 29 Miss., 139. These cases lay down the rule plainly that the payment of a less sum than that due by a debtor, without any other or different consideration, does not discharge the debt, but only operates as payment *pro tanto*. It seems to me there can be no doubt that the legal effect of all the pleas is that of payment of a less sum in discharge of the whole debt. If this be true, certainly they are insufficient.

Blair & Anderson, for appellees.

This court ought to hold that where the payee in a note surrenders it to the maker in consideration of the payment by the latter of a less amount due, even after maturity, the payee cannot recover the balance remaining unpaid on the note. In other words, where the transaction is completed and executed in every respect, the court ought not to disturb the *status quo* of the parties. Such a case is not covered by the principles announced in the cases of *Pulliam v. Taylor* and *Jones v. Perkins*, relied on by opposing counsel. The statements of facts in those cases do not show that the payment of the less amount than the contract called for had been made, and the contract, or evidence of indebtedness, transferred and surrendered, as in this case.

It is true there would be no consideration for the surrender of the contract under such circumstances, but it is in the nature

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of a gift of the balance due on the note or contract, and, where such an agreement is fully completed in every respect, there is no reason why they should not be upheld by the courts. There is no doubt whatever about the proposition that the payee in the note may make a valid and binding gift of his note to the maker. Our court recognizes this doctrine in the case of *Young v. Power*, 41 Miss., 197.

It is true an unexecuted contract to give is not binding, and cannot be enforced. Neither is a contract to make a deed of gift to land. But where the contract is executed, where the gift has been made, the court will leave the parties where they have placed themselves. We ask, what is the difference, in principle, between this class of cases and a case in which the payee has surrendered his evidence of indebtedness to the maker of the debt on the payment of only a part of what is owing to him? We can see none. The payee in the note says to the maker, "If you will pay me one-half of what you owe me, I will give you the balance of the debt." That is what it amounts to. The agreement, as long as it is unexecuted, is not binding. But, when fully executed, why should it not be, as in case of a gift?

WOODS, C. J., delivered the opinion of the court.

The single assignment of error is as to the action of the trial court in overruling the demurrer interposed by plaintiff below to the pleas of the defendant. If the pleas had distinctly set up a payment of the note sued on by the tender of \$1,000—a lesser sum than that named in the note—by the debtor, and the acceptance of this lesser sum by the creditor as full payment of the note, in pursuance of an agreement of both parties to that effect, before the day of the maturity of the note, then by all the authorities the pleas would have been good. For the reason, to quote Coke's quaint language in *Pinnel's case*, 3 Coke's Reports, 117, that "peradventure parcel of it before the day would be more beneficial to him than the whole at the day,"

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as multitudes of creditors who have been in sore straits can bear witness to from happy experience. But the pleas do not aver with sufficient distinctness any payment before the day of the note's maturity; they only aver that about the thirtieth of July payment was made, when the copy of the note sued on shows on its face that the note was due August 1. It is to be observed, however, that the declaration on the note does not profess to give an exact copy of the note, but only a substantial copy, because, as is alleged, the note itself was not in the possession of the plaintiff, but was then held by the defendants. Now, to this declaration the pleas only answered that about two days before the date of the note's maturity as shown by the copy sued on, and not made from the original then in the defendant's possession, payment was made by tender and acceptance of the lesser sum for the greater. But the plea is to be taken most strongly against the pleader, and about a certain time may mean a day or a week or a month after the time, as well as a day or a week or a month before the time.

We are unable to adopt as sound the argument of counsel for appellees that these pleas are pleas not of satisfaction and payment, but only pleas denying title in appellant to the note, because of the pleas averring that the note had been transferred and assigned by the payee to the payor. Whenever there is shown a legal assignment and transfer of an obligation to pay money by the obligee to the obligor, necessarily there is an extinguishment of the debt, and in such case the debt may be properly said to be satisfied, to be paid. And, as perfectly appears, not only from the transcript before us, but as is substantially agreed by the counsel of the respective parties, the pleas interposed all set up one and the same matters of defense, so it, also, perfectly appears that this defense was a new contract entered into by the parties, whereby it was agreed that the payor of the note should pay to its holder and owner, and the latter should accept from the former a lesser, stipulated sum for the greater sum named in the note, in full satisfaction

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of the debt, and as a full discharge of the payor from further liability, and that this new contract, with the concurrence of both parties thereto, has been completely executed by payment and acceptance of the agreed lesser sum, and the evidence of the indebtedness surrendered and delivered up to its maker by its holder.

With the case viewed in the light of the foregoing elucidation of the purpose and effect of the pleadings, this question—not a new one in our jurisprudence—squarely confronts us, viz.: Will the acceptance of a lesser sum, in money, by the payee of a note, than the greater sum actually due from the debtor, on the distinct agreement that such payment and acceptance of the lesser sum shall extinguish the whole debt evidenced by the note, operate to satisfy the note and discharge the debtor, unless the lesser sum of money is paid before the maturity of the note for the greater sum, or unless the lesser sum of money is paid at another place than that named in the note itself as the place of payment? This question has, in two cases, been remarked upon by this court, and, though not necessary to the determination of the question presented in either case, was, in both instances, affirmatively answered, though in both the affirmative answer was given with evident reluctance and with doubt as to its soundness. We refer to the cases of *Jones et al. v. Perkins et al.*, 29 Miss., 139, and *Pulliam v. Taylor*, 50 Miss., 251. In the former case, the defense was that the parties had contracted to pay and to accept \$1,500 in New York in discharge of a debt for \$2,000, payable by its terms in Mississippi; and the court held, as is universally held elsewhere, that this was a good defense. But that defense is not the one now before us. In the other case of *Pulliam v. Taylor*, the defense was that the debtor had compounded with his creditor, and the creditor had contracted and agreed to accept less than the whole amount of the debt, and had actually accepted the notes of the debtor for the smaller sum, to be paid in installments in equal annual payments thereafter, the notes being secured by mortgage, and

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that one of the notes had actually been paid to the creditor; and this was held to be a good defense to a suit brought by the creditor on the original debt, in disregard of the new agreement to accept notes for a lesser sum. But neither is this the defense before us in the present case.

In the case of *Burns v. Gordon*, 57 Miss., 93, in which this question was directly presented for determination, it was held that the plea of payment of a less sum for an original greater sum was bad; but the court contented itself with the bare statement of the holding, without reference to authorities, and without argument.

It has been held in England, though not unbrokenly, nor without now and then hostile criticism from bench and bar, that an agreement by a creditor with his debtor, to accept a smaller sum of money in satisfaction of an ascertained debt of a greater sum, is without consideration, and is not binding upon the creditor, even though he has received the smaller sum agreed upon in the new contract. And in the United States, blindly following what was supposed to be settled law in England for nearly three hundred years, our courts have uniformly announced adherence to this rule, though in most of the cases examined by us, no such announcement was necessary to their determination. The rule is, in nearly all the cases, declared to have been first announced in Pinnel's case, 3 Coke's Reports, 117, whereas, an examination of that mischievous and misleading reported case will make it appear at once that the question before us was not in any way involved. Pinnel's plea was, that before the maturity of his bond for the larger sum, plaintiff had accepted a lesser sum agreed upon between the parties, in full satisfaction of the original debt. Now, all the authorities, American and English, including Coke himself, agree that this was a good defense, and that the plaintiff was bound by it, if defendant should properly plead it to a suit for the entire original debt. But the hapless Pinnel, in that remote period when courts were almost as jealous for the observance of technical

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rules of special pleading as for the execution of justice according to right, was adjudged to pay the whole debt, the plaintiff having judgment against him because of his "insufficient pleading, for," says Coke, "he did not plead that he had paid the £5 2s. 2d. in full satisfaction (as by law he ought), but pleaded the payment of part generally, and that the plaintiff accepted it in full satisfaction."

However amusing and absurd this may appear to us, it was the point decided in Pinnel's case, and the question before us was not only not decided, but it was impossible that it should have been. There Pinnel pleaded payment of the lesser sum before the date of the maturity of the greater sum named in the bond, and its acceptance by his creditor in full satisfaction, and he lost, unhappy wretch that he was—born two or three centuries too soon, and not knowing the difference betwixt legal tweedledum and legal tweedledee—because he pleaded that he paid a part of the greater original sum and that the plaintiff accepted it in full satisfaction, and did not plead that he paid it in full satisfaction. The rule is found in Pinnel's case, but it is bald dictum, and, as stated by Lord Blackburn, in *Foakes v. Bee*, before the house of lords, 9 Appeal Cases, Law Reports, 605, for the long period of one hundred and fifteen years after Pinnel's case was decided no case is to be found "in which the question was raised whether payment of a lesser sum could be satisfaction of a liquidated demand." And even after the lapse of more than a century, when the hoary dictum in 3 Coke, Pinnel's case, had by some of the English courts been thought to have ripened into authority, the authority of the dictum was doubted in other tribunals, and its correctness more than once denied, as Lord Blackburn vividly and overwhelmingly demonstrates. Before turning to the American courts, we quote with distinct approbation the observations following, with which Lord Blackburn concludes his opinion, intended to show that Coke was mistaken as to fact, as well as law, in endeavoring to uphold the rule announced by the dictum in Pinnel's case, that

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the new agreement to pay a lesser sum is void because unsupported by any consideration—that is, that no benefit, in such case, inured to the creditor, viz.: “What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so.”

Turning now to the holdings of the American courts on this question, we are profoundly and painfully impressed with the slavish adherence of the legal and judicial mind to precedent, or, in many cases, to what seems to be precedent only. We have seen already that in neither of our own two reported cases, to which we first referred, was there any question of the effect of a payment in money of a smaller sum in full satisfaction of a larger sum, after maturity of this larger sum, and at the place of payment named in the original contract, and yet in both instances the law is stated to be as laid down in the dictum in Pinnel’s case, though in one of our cases (*Jones v. Perkins*) it is declared that the rule is entirely technical, and not very well supported by reasons (as a New York court had before then remarked), and “that it requires but very slight consideration to support such contracts”—that is, contracts to pay a lesser sum for and in full satisfaction of a greater original debt. In the other case in our reports (*Pulliam v. Taylor*) the court said: “The reason given by Lord Ellenborough, in *Fitch v. Sutton*, 5 East, 232” (the first case, in Lord Blackburn’s opinion, in which the dictum in Pinnel’s case is acted upon as authority, unmistakably), “why the acceptance of a less sum in money than is actually due will not extinguish the whole debt, though received by the creditor upon that condition, is that there must be some consideration for the relinquish-

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ment beyond the amount paid—something to show the possibility of benefit to the creditor. It is well settled on authority, that if the creditor accept some other thing—as, a chattel of much less value—it could be pleaded in satisfaction. There is no sound, rational distinction between the acceptance of an article of property, worth just half the amount of the debt, especially such commodities as cotton or iron, that have a definite market value, and the acceptance of half the amount of the debt in money.” And yet, although in both our cases the rule under consideration is denounced in the opinions as entirely technical,” “not well supported by reasons,” not sound, and irrational, it is, nevertheless, seemingly agreed in both that the acceptance of a less sum in money than is actually due will not extinguish the debt, though in neither case was any such point before the court for adjudication.

In New York, where the dictum in Pinnell's case has been received as authority, the highest court has said: “It is true there does not seem to be much, if any, ground for distinction between such a case” (one where the debtor offers additional security for a smaller sum and the creditor accepts such security for the smaller sum as satisfaction for the whole debt) “and one where a less sum of money is paid and agreed to be accepted in full, which would not be a good plea. But the distinction is as sound as that which exists between the cases of receiving a less sum of money and an article of property just half the value, which would constitute a perfect defense. The rule that the payment of a less sum of money, though agreed by the plaintiff to be received in full satisfaction of a debt exceeding that amount, shall not be so considered in contemplation of law, is technical, and not very well supported by reason. Courts, therefore, have departed from it upon slight considerations.” *Kellogg & Dumont v. Richards & Sherman*, 14 Wend., 116. It is worthy of curious note that neither in this case, nor in that of *Boyd & Saydon v. Hitchcock*, 20 Johns., 76, on which this case rests, was there any plea of

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payment of a lesser sum of money in satisfaction of a greater sum in an original debt, but in one case the point involved was whether a creditor, on a compromise with his debtor, who accepts the note of a third party for a less sum than the original debt due him, in full payment of his debt, may recover any part of his original debt beyond that secured by the note of the third person; and, in the other case, the point was whether a debtor, who gives his note indorsed by a third party as further security for a part of a larger original debt, which is accepted by the creditor in full satisfaction of the whole debt, may plead this in bar of a recovery on the original demand. And, in both cases, the debtor was held discharged from the original debt beyond the sum secured by the note of the third person, or that secured by the note of the debtor for the smaller sum, and indorsed by a third party.

In *Harper v. Graham*, 20 Ohio, 105, the general rule was announced in about the terms employed in the other cases cited by us, and its utter absurdity exposed in vigorous phrase. Says the opinion: "The history of judicial decisions upon the subject has shown a constant effort to escape from its absurdity and injustice. . . . We see, then, that the payment of a less sum than is due, the day before the debt falls due, will discharge it; payment at another place than is stipulated will do so; the delivery of a collateral article of any value will do so; the acceptance of the debtor's note with security, the note of a third person, or even the negotiable note of the debtor himself, will do so. And yet, the payment of as much money in hand as is called for by such note, will have no such effect, although it is demonstrable that the utmost that the creditor can get from such note cannot exceed in amount that which he gets in hand in the other case, without trouble, delay, or expense. It may seem, to some persons not having a great veneration for these institutions of antiquity, for which no reason can be given, that a rule so effectually undermined, and having neither rhyme nor reason to support it, ought to be at once

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overruled and the whole matter placed upon the footing of reason and common sense, especially as the exigencies of modern commerce frequently compel the most deserving men, with the aid of friends, to compromise their debts for less than the amount due—an operation mutually beneficial to both debtor and creditor, as the creditor gets a part, where otherwise he would lose the whole, and the debtor is left free to commence again with the hope of better success. These considerations will necessarily arise whenever it becomes necessary to decide the general question. In this case we aspire to nothing higher than to follow in the footsteps of the sages of the law, and hold this one of the cases 'taken out' of the rule, because the money, by the original obligation, was payable in Ohio, whereas the lesser sum of money was paid at another place, to wit, in Arkansas."

The absurdity and unreasonableness of the rule seem to be generally conceded, but there also seems to remain a wavering, shadowy belief in the fact, falsely so called, that the agreement to accept, and the actual acceptance of, a lesser sum in the full satisfaction of a larger sum, is without any consideration to support it—that is, that the new agreement confers no benefit upon the creditor. However it may have seemed three hundred years ago in England, when trade and commerce had not yet burst their swaddling bands, at this day and in this country, where almost every man is in some way or other engaged in trade or commerce, (it is as ridiculous as it is untrue to say that the payment of a lesser part of an originally greater debt, cash in hand, without vexation, cost, and delay, or the hazards of litigation in an effort to collect all, is not often—nay, generally—greatly to the benefit of the creditor.) Why shall not money—the thing sought to be secured by new notes of third parties, notes whose payment in money is designed to be secured by mortgage, and even negotiable notes of the debtor himself—why shall not the actual payment of money, cash in hand, be held to be as good consideration for a new agreement, as bene-

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ficial to the creditor, as any mere promises to pay the same amount, by whomsoever made and howsoever secured? And why may not men make and substitute a new contract and agreement for an old one, even if the old contract calls for a money payment? And why may one accept a horse worth one hundred dollars in full satisfaction of a promissory note for one thousand dollars, and be bound thereby, and yet not be legally bound by his agreement to accept nine hundred and ninety-nine dollars, and his actual acceptance of it, in full satisfaction of the one thousand dollar note? No reason can be assigned, except that just adverted to, and this rests upon a mistake in fact. And a rule of law which declares that under no circumstances, however favorable and beneficial to the creditor, or however hard and full of sacrifice to the debtor, can the payment of a less sum of money at the time and place stipulated in the original obligation, or afterwards, for a greater sum, though accepted by the creditor in full satisfaction of the whole debt, ever amount in law to satisfaction of the original debt, is absurd, irrational, unsupported by reason and not founded in authority, as has been declared by courts of the highest respectability, and of last resort, even when yielding reluctant assent to it. We decline to adopt or to follow it, and if there is anything in the cases of *Jones v. Perkins*, 29 Miss., 139, or *Pulliam v. Taylor*, 50 Miss., 251, which may be regarded as sanctioning the rule that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt greater in amount than such agreed payment, shall not be so considered in legal contemplation, then, to that extent, those cases are hereby overruled; and the case of *Burrus v. Gordon*, 57 Miss., 93, in so far as it sanctions the rule we are combating, is hereby overruled.

Affirmed.

WHITFIELD, J., specially concurring.

In the notes to *Cumber v. Wane*, Smith's Leading Cases, vol. 1, part 1, p. 602, it is said: "There is authority for saying that a liquidated demand, founded upon a bill of exchange or

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promissory note, even though overdue, may be forgiven by word of mouth; and if this be law, *a fortiori*, such a demand might be discharged by the payment of a less amount than that secured by the note," citing *Foster v. Doeber*, 6 Exch., 839. But it is said that this is not true, if the debt be not evidenced by bill of exchange or promissory note. *Ib.* This is in the English notes. In the American notes it is said, p. 630, citing *Campbell's Estate*, 7 Burr, 100: "A parol forgiveness of a promissory note . . . is invalid, unless there is a consideration or the instrument is surrendered. All the cases agree," said Gibson, C. J., "that the final discharge of a debt without consideration or the delivery up of the security is inoperative." Again, on page 631: "The appropriate mode of releasing a debt is by a writing under seal or by surrendering the bond or note constituting the evidence of the obligation. . . . The surrender of a right of action . . . requires a seal and consideration, or that the instrument which represents the right should be handed over by the creditor," citing many authorities, and the same rule is set out on pages 633 and 635, at which last page it is said: "And it has been held that the debt may be forgiven by the surrender of the instrument to the obligor . . . without the aid of a seal or the presence of a consideration." And in *Clark on Contracts* (1894), p. 184 *et seq.*, the subject is fully discussed, the author saying, p. 190: "Since a person may, if he choose, make a gift to another which, when executed, will be irrevocable, a creditor may, on receiving part of the debt, expressly forgive the debtor the residue," citing many authorities, among others *State v. Story*, 57 Miss., 738, which last case is an improper citation, for that was a case of compromise of a disputed claim, resting on wholly different considerations. Finally, *Young v. Power*, 41 Miss., 197, expressly holds that "where a note is delivered up by the creditor to the debtor, accompanied by the declaration that the creditor forgave the debt, or would not require payment, it was a valid executed gift of the debt and a

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release of it." With us, of course, the presence or absence of the seal counts for nothing.

Now, in this case there are present all the facts which, under the above principles, make the delivery up of the notes a valid executed gift, falling strictly within the rule announced in *Young v. Power*, *supra*. The notes were surrendered by the deceased creditor to the debtor on the express agreement that they were not to be paid. There can, in such case, be no danger of fraud, perjury, or mistake.

In the English note above referred to, in Smith's *Leading Cases*, p. 610, it is said: "A principle so deeply established in the very forms and elements of the law, and which has so long sustained itself in the courts, has something better than a mere barren technicality to rest upon. In fact, as a technical rule, it may be doubted whether the maxim that a smaller sum cannot be a satisfaction of a larger debt, could apply to anything but a bond, which the old law regarded as an actual gift or transfer of the money, and gave the action of debt for the detainer of what was, in law, the very property of the obligee; technically it would be difficult to make it apply to simple contracts. But, as a principle of evidence, this rule which requires for the substantiation of such agreements either a surrender of the instrument or a legal release, is a just, wise, and convenient rule, so great is the danger of fraud and mistake."

The distinction here drawn, placing the rule for its reason on the surrender of the instrument as a mode of proof rather than upon a supposed doctrine of substantive law that in no case can the payment of a smaller sum satisfy the debt, meets, on principle and on authority, the exigencies of the present case. And while not desiring to be understood as dissenting from the vigorous and splendid reasoning of my brother, Woods, I simply prefer to rest the decision of this case upon its proper facts.

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MOBILE & OHIO RAILROAD CO. v. C. C. WEEMS.

RAILROAD. *Live stock on track; when no liability for damage to.*

If, in a suit against a railroad company for injury to live stock on its track, caused by the running of its train, the servants of the company used every reasonable effort to prevent the injury, the plaintiff is not entitled to a recovery.

FROM the circuit court of Clarke county.

HON. S. H. TERRAL, Judge.

The facts are stated in the opinion.

Argued orally by *A. J. Russell*, for appellant.

A. Anderson, for appellee.

STOCKDALE, J., delivered the opinion of the court.

Appellee (plaintiff below) recovered judgment in his suit in the circuit court of Clarke county, there on appeal from a justice of the peace court, against defendant (appellant here) for the sum of ninety dollars, value of a horse killed by defendant below, and defendant appealed to this court. There are two assignments of error by counsel for appellant: (1) The court erred in refusing a peremptory instruction asked by defendant below; (2) error in refusing a new trial on motion of defendant. There is no complaint made against the instruction of the court, given at the instance of plaintiff below, and could be none, which informed the jury that the evidence must show that the servants of defendant used every reasonable effort to avoid killing the animal, otherwise they could not find a verdict for defendant. The peremptory instruction was probably refused in view of confusion and some conflicting statements in the testimony.

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The only question here—the defendant being (code 1892, § 1808) *prima facie* liable—is, did the servants of defendant “use all reasonable effort to avoid the killing of the horse in question?” If not, what else ought they to have done that would have avoided the accident?

The horse walked out of Mr. Weems’ lot to the railroad track, and walked all the way to the trestle—250 yards—and into the trestle, and got his front feet down upon the ground between the ties, and the ground was two feet below the planks or ties, and it seems strongly probable, from the testimony of three of the witnesses, that the horse was struck and killed in that position. Mr. J. H. Weems, husband of plaintiff, testified, on the trial, that, “in witness’ opinion, the horse could have extricated his fore feet from between the ties if he had had a chance to do so.” The horse was young and strong and in good order. He stood with his front feet down on the ground between the ties of the trestle, and his hind feet on the ground at the north end of the trestle, with his head south. The train that killed him came from the south.

The engineer blew the signal whistle—one long blast—about a quarter of a mile, or less perhaps, before reaching the trestle, and soon after blew two short blasts to blow off brakes, which was sufficient to attract the attention of the horse. And then the train approaching him with the loud noise a freight train usually makes, and the headlight in good order glaring in his face, surely would have frightened the horse sufficiently to induce him to extricate himself had it been possible for him to do so. The instinct of the animal, it would seem, would have prompted his utmost exertion.

The engineer testified he could not have stopped that train in less than two hundred and fifty or three hundred yards; there was no effort to contradict that statement, no cross-examination directed to show that statement to be error. And if he could have observed the horse at one hundred and fifty or two hundred yards, he could not have stopped until he passed the trestle,

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and the result would have been the same. So far as the record shows, we do not see what else the servants of the road could have done that would have been effectual to avoid the accident, or have been likely to have avoided it.

We think that unless some new light can be thrown on the circumstances surrounding the killing of the horse, a recovery should not be had, and the motion for a new trial ought to have been sustained.

The judgment of the court below is reversed, the motion for a new trial sustained, a new trial granted, and the cause remanded.

WILL HUNTER v. THE STATE OF MISSISSIPPI.

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1. CRIMINAL LAW. Murder. Instruction.

An instruction which authorizes a conviction of murder upon mere proof of the killing is erroneous. *Kearney v. State*, 68 Miss., 239, approved.

2. SAME. Confession. Court and jury.

The court determines the competency of a confession, and, when admitted, the jury cannot rightfully fail to consider it as evidence, though, if they disbelieve the witnesses who testify to the confession, they may attach no weight to the same.

3. SAME. Free and voluntary. Reasonable doubt.

The court should not admit a confession if it entertains a reasonable doubt as to whether it was free and voluntary.

FROM the circuit court of Tunica county.

HON. F. A. MONTGOMERY, Judge.

The appellant was indicted for the murder of one Thompson. Both parties were negroes. The evidence showed, or tended to show, the following facts: Appellant was invited to a "quitting," being informed, by the party who delivered the invitation, that Thompson, between whom and appellant ill feeling existed, would be present. On his way to the entertainment,

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appellant carried his Winchester rifle, and secreted it near the house where the festivities were given. When the "quilting" was over, appellant, having made an engagement to do so, offered to escort a girl home, but was interfered with by Thompson, who drew a pistol on him and took the girl from him. Appellant, with the view of carrying out his engagement, went for his gun, and, having secured it, followed Thompson and the girl, went around them, and confronted them in the road. When he did so, Thompson at once shot at appellant and ran in the direction of John Adams' house, which was seventy-five or one hundred yards away. The girl also ran, going to her home in much haste unescorted. Appellant returned Thompson's fire just before he ran, but did not hit him. After this shooting in the road, the appellant claimed to have gone at once to his own home, which was in a direction from the scene of conflict opposite to that in which Adams' house was situated. About ten or fifteen minutes after Thompson reached Adams' house, he walked out at the front of the residence and was shot and killed, no one there present seeing the party who fired the shot. On the trial, the appellant offered to introduce evidence of threats to kill him recently made by Thompson, and which threats, it was proposed to show, had been communicated to appellant before he started to the "quilting." The court below would not allow this evidence to be offered. The appellant was convicted, and appealed.

The second instruction for the state was in these words: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that defendant killed deceased, while he (deceased) was standing in the door at John Adams' house, then they must find him guilty."

The second and fourth instructions asked by the defendant, and which were refused, were as follows:

"2. The court instructs the jury that although you may believe, from the evidence, the defendant confessed to W. A. Spratlin that he killed deceased, still, unless you believe, be-

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yond all reasonable doubt arising out of the evidence, that said confession was made by defendant after he had been warned by the said Spratlin that said confession might or would be used against him in the trial of his cause, you will not consider said confession as any evidence against the defendant."

"4. The court instructs the jury, although you may believe, from the evidence, that the defendant confessed to W. A. Spratlin that he killed deceased, still, unless you believe, beyond all reasonable doubt arising out of the evidence, that said confession was voluntarily made, you will not consider said confession as evidence against the defendant. And if you believe, from the evidence, that said Spratlin obtained said confession by practicing deceit on defendant, or by any artful means, or by reason of his superior intelligence over that of defendant, the defendant at the time not understanding his legal rights, you will not consider said confession as evidence against the defendant."

Lowe & Cochran, for appellant.

The second instruction asked by the state, and granted, is erroneous in this, that the court invaded the province of the jury when it instructed that: "If the jury believe from the evidence, beyond a reasonable doubt, that defendant killed deceased, while he, deceased, was standing in John Adams' house, then the jury must find him guilty." The court can declare the law, but not the verdict of the jury. The court could have told the jury what was their duty, or what they ought to do, if they believed, beyond a reasonable doubt, a given state of facts, but it had no authority to peremptorily order them, under any circumstances, to find the defendant guilty. Under our system of jurisprudence, the jury is the judge of the facts; the court is the judge of the law. No more can the court dictate to the jury than can the jury dictate to the court. The instruction being mandatory to find the defendant guilty, is erroneous. *Flynn v. The State*, 43 Ark., and cases cited; *Kearney v. State*, 68 Miss.; 2 Thompson on Trials, 2149.

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We submit that a confession "pumped" out is not a voluntary confession. If there is a reasonable doubt as to its being voluntary, the confession should be excluded. *Williams v. State*, 72 Miss., 117; *Ellis v. State*, 65 Miss., 44. Such confession should not only be excluded on the ground of great danger of harm to defendant, but to prevent even the possibility of harm befalling him.

Frank Johnston, on same side.

The court erred in not permitting the defendant to explain why he carried the gun to a place near the house where the quilting party was held before the killing. In view of the peculiar character of this case, this testimony was competent and material, and should have been admitted. The defendant has been convicted wholly upon the evidence of his alleged confession, testified to by one witness. Excluding the alleged confession, there is absolutely no evidence whatever against the defendant.

The fact that defendant had previously carried his gun to this place, without being permitted to explain why he placed it there, must have operated strongly upon the minds of the jurors, and against the innocence of the defendant. It would have been inferred that he had deliberately arranged to murder the deceased, by having his gun in readiness before the deceased had done anything aggressive, and before there was any difficulty between the defendant and the deceased. This fact, standing alone, that the defendant had placed his gun in readiness before the difficulty, was a formidable circumstance to show a premeditated and malicious design to kill the deceased, and afforded a strong presumption that he shot the deceased as he stood in the doorway of John Adams' house, and is strongly corroborative of his alleged confession. On the other hand, if the accused knew that the deceased had made threats against his life, and, knowing that he would be likely to meet the deceased, had placed the gun there in order that he might use it

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in self-defense and for his own protection, the presumption of malice or premeditated intention to kill the deceased would have been removed, or, manifestly, very greatly weakened in its force.

The second instruction given for the state is unusual, if not unprecedented, in this: The court, on a hypothetical state of facts, tells the jury peremptorily that they must convict. The court may instruct as to the law and advise the jury as to their duty, but it cannot tell them, on any hypothetical case, that they must find a defendant guilty of murder. The instruction is too meager in not defining a reasonable doubt, and in not defining the crime of murder. It requires a conviction if the accused "killed" Thompson. This was clearly erroneous.

Argued orally by *Frank Johnston*, for appellant, and by *Wiley N. Nash*, attorney-general, for the state.

WHITFIELD, J., delivered the opinion of the court.

The second instruction for the state is erroneous in telling the jury that if they believed, etc., that the defendant "killed deceased while," etc., they must find him guilty. It authorized conviction upon the proof of "killing" merely, and is expressly condemned in *Kearney v. State*, 68 Miss., at p. 239. There was no error in refusing the second and fourth instructions asked by the defendant, as drawn. The court determines the competency of a confession—as being voluntary—and the jury cannot then disregard it or fail to consider it as evidence. All competent testimony they must consider and weigh. If they believe the witnesses testifying to the confession are testifying falsely, they can disbelieve such witnesses, as to that, and attach no weight to the confession. But they are bound to weigh and pass upon all testimony held competent by the court. We understand the court to have held this confession competent. As we reverse the case upon other grounds, we intimate now no opinion as to its competency. The court

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should not admit a confession in evidence if it entertains a reasonable doubt as to whether it was free and voluntary. *Ellis v. State*, 65 Miss., 44; *Williams v. State*, 72 *Ib.*, 121, 122.

The third instruction asked by the defendant should have been given, and the defendant should also have been allowed to testify as to the threats alleged to have been made against his life, and as to his purpose in carrying the gun to the place where he put it.

Reversed and remanded.

J. R. ZACHERY v. MOBILE & OHIO RAILROAD CO.

COMMON CARRIERS. *Passengers. Blind person.*

A common carrier of passengers cannot refuse to carry a person otherwise qualified, upon the sole ground that he is blind.

FROM the circuit court of Clarke county.

HON. S. H. TERRAL, Judge.

The facts are stated in the opinion.

J. L. Buckley and *D. W. Heidelberg*, for the appellant.

The declaration does not present the question of the right of the company to pass a rule or regulation requiring blind persons, before riding on its trains, to provide themselves with an assistant. It does not appear that any such rule or regulation was ever enacted. The declaration presents the simple question whether a railroad company can prevent blind persons, under any and all circumstances, from riding on its trains, and whether it can refuse to permit a blind person from taking passage without informing him upon what ground the refusal is based, he being able and willing to comply with all the conditions demanded. The exact point seems never to have been presented in any court in this country, which fact in itself is

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evidence that the law is with us. There exists the same show of reason for not permitting the blind to travel on highways and streets as there does for denying them the right to travel on trains. In any crowded street there is much danger, to the traveling blind, of being injured by vehicles and cars. Yet it has been decided that a blind person, and one lame and deaf, has a right to walk where other persons, not disabled, have the right. Buswell on Law of Personal Property, p. 223, sec. 146. "The old and the infirm, however, not less than the young and the agile, have a right to move about and attend to their business, and are entitled to the protection of the law in so doing. . . . The old, the lame, and the infirm are entitled to the use of the streets, and more care must be exercised towards them by engineers than those who have better powers of motion. . . . Physical disabilities of the character mentioned in this section, which may be designated as natural or providential disabilities, are to be conceded a far higher indulgence in the law than the self-inflicted disability of drunkenness. It may be said that men make themselves drunk at their own peril, but men are not to be held blind, or deaf, or lame, or aged in any such sense." Beach on Contributory Negligence (2d ed.), p. 500, sec. 396.

"A person who is blind, aged, sick or infirm, if his condition is known to the carrier, is entitled to more care and attention than one who is under no such disability, as to the time allotted and the assistance shown in getting in and off the train." *Hunks v. Chicago & Alton Railroad Co.*, 1 Mo. App. Rep., 92.

Section 4287 of annotated code of 1892 provides that "the track of every railroad which carries persons or property for hire is a public highway, over which all persons have equal rights of transportation for themselves and their property, and for passengers, freight, and cars," etc. The blind, as well as those who have their sight, are included in the language of the above section.

Brief for appellee.

Charles M. Wright, for appellee.

“One who from any cause is not able to do as travelers usually do in conforming to the usage in running trains for the traveling public, should avoid them, or secure the assistance necessary to enable them to accomplish what is required of persons generally.” *Sevier v. Railroad Co.*, 61 Miss., 11. It is evident that one blind is incapable of taking care of himself. He is unable to do as “travelers usually do.” The law imposes on him the duty of taking care of himself and providing himself with an assistant. It will not then impose on the railroad company the duty to accept him as a passenger without such assistant.

A. J. Russell, on same side.

The declaration does not advise the defendant how the plaintiff is damaged. It alleges plaintiff “preached the gospel, made mattresses and sold books” for a living. The declaration then shows plaintiff was prevented from keeping an engagement at Vinegar Bend, Buckatunna, Enterprise and Ellisville. It does not appear in the declaration whether these engagements were engagements to preach, make mattresses or sell books; or whether they were engagements to perform all of these services.

The declaration then concludes with the averment that plaintiff, in round numbers, is damaged seven thousand dollars. Whether for sermons, mattresses or books, or a combination of two or all of them, we respectfully submit that these allegations are entirely too vague and uncertain upon which to base a recovery.

Again, the declaration alleges that plaintiff was blind, and applied for passage on defendant’s train, without averring that he had an attendant. Pleadings are construed most strongly against the pleader, and the presumption is that the plaintiff has no attendant, else he would have alleged it. We insist that, as a matter of law, a blind man, without an attendant, is not “entitled to travel as persons generally do.” We affirm,

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as a corollary of the two decisions of our court, *Weightman v. Railroad Co.*, 70 Miss., 563; *Sevier v. A. & V. Ry. Co.*, 61 Miss., 8, that a railroad company has the right to decline to receive and accept as passengers persons presenting themselves as such, who are known to the railroad company to be, from any cause, unable to care for themselves as others do who travel generally, and by the acceptance of whom the railroad company would thereby assume burdens and obligations to care for said passengers in such condition that they do not discharge toward the traveling public generally.

Argued orally by *A. J. Russell*, for appellee.

STOCKDALE, J., delivered the opinion of the court.

On the thirteenth of March, 1896, appellant exhibited his declaration in the circuit court of Clarke county, alleging that, for several years, he had been traveling on appellee's road, and had business at various stations, and had never given cause of complaint to appellee's servants, and no objection had been made to his riding on appellee's trains until January 25, 1896, and February 23, 1896, at which times appellee refused to sell him tickets from Chickora to Vinegar Bend, and from Vinegar Bend to Buckatunna, which was humiliating and annoying, he being away from home; that, on March 13, 1896, he was again denied a ticket to ride on defendant's road, at Stonewall station, and that, on all these occasions, he offered to the agents of said road the price of the fare, and had engagements that he was deprived of filling on account of the wilful refusal of appellee's agents to sell him tickets; that appellee had no other reason for refusing him passage than that appellant was blind, which is true.

To this declaration appellee (defendant below) interposed a demurrer, upon the ground that the declaration shows that the plaintiff was blind, and was not a fit person to travel by himself, and that, as a matter of law, defendant had a right to

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decline to sell plaintiff a ticket unless accompanied by an attendant. The court below sustained the demurrer, and plaintiff appealed.

The demurrer admitting the truth of the allegations of the complaint, one of which is to the effect that the appellant had been riding on appellee's road for several years, pursuing his occupation, and had given no cause of complaint, and none had ever been made until January 25, 1896, and that the sole reason for rejecting him as a passenger was his blindness, it follows that the naked question, detached from any attending circumstances, is whether a person, otherwise qualified, may be rejected as a passenger for the sole reason that he is blind, and this court is asked to announce that to be the law. There seems to be a scarcity of decisions on the precise point.

In Rorer on Railroads, vol. 2, p. 957, it is laid down as the law that "as common carriers of persons, railroad companies are ordinarily bound to carry, according to their reasonable rules and regulations, and in accordance with their regular time cards, all persons who apply to be carried, and are ready to pay, and do pay the usual fare when required, except unsuitable persons, hereinafter mentioned." These exceptions are those who desire to injure the company, notoriously bad or justly suspicious persons, gross or immoral persons, drunken persons, and those who refuse to obey the rules.

It is laid down in Angell on Carriers, sec. 524, to be the common law that "it is the duty of public or common carriers of persons *to receive all persons who apply for a passage*" (these words italicized). In sec. 525 it is said: "It is, in fact, beyond all doubt that the first and most general obligations on the part of public carriers of passengers, whether by land or water, is to carry persons who apply for a passage."

These are the general rules, subject always to the exceptions enumerated; but we have not found any decision holding that, as a matter of law, a person can be rejected because he is blind. It is urged by counsel for appellee that a rule of a railroad

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company authorizing the refusal, by its agents, of an infirm passenger, unless provided with an assistant, is reasonable and demanded by the convenience of the traveling public. A proposition we do not controvert, but in this case there is nothing in the record to show that appellee had made or promulgated such a rule. On the contrary, it is alleged in the complaint and admitted by the demurrer, that appellant was not infirm but robust, able to take care of himself, and to comply with the rules applying to passengers generally; that he had been traveling on appellee's road for several years, and given no cause of complaint to appellee's servants, and none was ever made. All this being admitted by the demurrer, the doctrines laid down in *Sevier v. A. & V. R. R. Co.*, 61 Miss., 10, relied on by appellee, do not apply to this case. There is nothing to show that appellant was informed that the absence of an attendant was the cause of his rejection, and nothing to show that he needed one. Appellee's counsel contends that infirm passengers require more and extra care, and for that reason railroad companies have the right to reject them. But appellee admits, by its demurrer, that appellant was not such a passenger, and had never required extra care.

We do not desire to intimate any opinion as to what regulations and rules railroad companies may make as to passengers, but we decline to hold that, as a proposition of law, stripped of all attending circumstances, public carriers of passengers can reject a person otherwise qualified, upon the sole ground that he is blind.

The judgment of the court below is, therefore, reversed, the demurrer overruled and the cause remanded.

Statement of the case.

CHARLES CAMPBELL v. NEW ORLEANS NATIONAL BANK.

1. WAGERING CONTRACTS. *Judgment.*

A suit on a judgment rendered upon a note given for a gambling contract can be defeated by showing the illegality of the original transaction.

2. SAME. *Code 1880, § 990; Code 1892, § 2114.*

Judgments on any wager whatever are void under the statute (code 1880, § 990; code 1892, § 2114), and money lost on any wager can be recovered back by the loser.

3. SAME. *Futures.*

A contract for the payment of differences in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid.

4. SAME. *Repeal of statute. Code 1880, § 990; Laws 1882, p. 140.*

Repeals of statutes by implication are not favored. Code 1880, § 990, was not repealed by act of 1882 (Laws 1882, p. 140). The second section of the act of 1882 was idle and did not change the law already in force, so far as concerns contracts made in this state.

FROM the circuit court of Montgomery county.

HON. C. H. CAMPBELL, Judge.

The New Orleans National Bank sued appellant upon a judgment. The defendant in the court below filed two pleas, each averring that the judgment sued upon was rendered by default upon a promissory note executed in this state to J. H. Allen & Co., to reimburse them for money paid for defendant, and as defendant's agents, in a gambling transaction on the rise and fall of prices, commonly called dealing in futures. A demurrer to the plea first filed was sustained, and then the second one was presented, varying the defense only in form, and, a demurrer being sustained to the second plea, the defend-

74	526
190	756

74	526
195	6

Brief for appellee.

ant below declined to plead further. Judgment having gone against defendant, he appealed.

Sweatman, Trotter & Knox, for appellant.

That the contracts mentioned in the pleas were wagering contracts, and as such utterly void, is clear. Code 1880, § 990; code 1892, § 2114; *Clay v. Allen*, 63 Miss., 426; Lawson on Contracts, sec. 288; Tiedeman on Commercial Paper, sec. 189. And equally so are contracts made for the advancing of money knowingly to be used in gambling. Code 1880, § 990; code 1892, § 2114; *Clay v. Allen*, 63 Miss., 426. The fact that a note was given in settlement of losses, that the note was transferred and a judgment obtained thereon, makes no difference under our law. 12 Smed. & M., 571; *Ib.* 157; 55 Miss., 244. The act of 1882 (Laws 1882, p. 140) did not repeal code 1880, § 990. This act of 1882 was intended to enlarge the statutes against gambling in futures, and not to restrict them.

Hill & Sisson, on same side.

The judgment sued upon is not conclusive against the pleas. A judgment upon a gambling contract, under our law, is utterly void, even if rendered in favor of an assignee, and can have no legal effect whatever. *Lucas v. Waul*, 12 Smed. & M., 157; *Smyther v. Keys*, 1 George, 179; *McAuley v. Mardis*, 1 Walker, 307; *Cranford v. Storm*, 41 Miss., 540. The "buying of futures" was actually prohibited by code 1880, § 990, and there is no inconsistency between that section and the act of 1882.

Somerville & McLean, for appellee.

Is the judgment of 1889 for money lost at a "wager," and therefore void? § 2114, code of 1892 (§ 990, code 1880). Is it a judgment upon a contract for purchase of a commodity to be delivered at a future day, etc.? § 2116. If the latter, was not the cause of action merged in the judgment, and can there

Brief for appellee.

be any inquiry as to the original consideration? The only exception to the general doctrine of merger in our common law courts is the change of the rule prescribed in cases coming within § 2114, code of 1892 (§ 990 of code of 1880), where the judgment is condemned as void.

If the contention of appellant's counsel were well founded, the act of 1882 against futures would have been entirely unnecessary. Invoking the rule of construction applied in *Lemonius v. Mayer*, 71 Miss., 514, let us consider (1) the old law, (2) the mischief, (3) the remedy provided by the act in question. The law against the wagering of contracts has been upon the statute books since 1822, and yet Judge Cooper, in the case last cited, p. 521, says: "Now, the old law was that the contracts commonly called 'futures' were legal contracts, and that a party thereto might enforce them by resort to the courts."

The mischief resulting from such speculations need not be rehearsed here. The remedy which was deemed sufficient was to make the act criminal, and to deny the right of enforcement of the contract in any court of this state. The time to call in question that right was when the action was first brought on the note. The legislature did not intend to make the judgment void, or it would have said so, as in the case of wagering contracts. It did not intend to impose such a clog upon commerce or to destroy the equities of subsequent holders and assignees by giving perpetual right of repudiation, to be waived or exercised at the option of the defaulter. 5 How., 110.

Cases cited by opposing counsel in the lower court, which seemed to militate against the foregoing views are not applicable to the case at bar. *Smither v. Keys*, 1 George, 179, holds judgment void because the statute says so. Hutch. code, § 940. In *McAuley v. Mardis*, Walker, 307, the judgment was not plead as *res adjudicata*. The case of *Clay v. Allen*, 63 Miss., 426, is simply to the effect that, prior to the enactment of 1882, a wager might be made under the guise of a sale or purchase of cotton. But transactions since that enactment, and within its

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terms, are by every reasonable rule of construction to be judged by it. Section 990, code of 1880, was not sufficient. Its penalty was excessive in rendering a judgment on the contract absolutely void, and hence the enactment of the law of 1882, prescribing different penalties and preventing the enforcement of the contract.

WOODS, J., delivered the opinion of the court.

The pleas allege, in unmistakable terms, a wagering contract, and the appeal from the judgment of the court below holding them bad, presents this single question, viz.: Is the fact that judgment was rendered on the note of appellant in settlement of his losses under the contract, a preclusion of inquiry as to the nature of that contract in an action upon the judgment?

Section 990 of the code of 1880, and the corresponding section (2114), code of 1892, renders void any judgment on "any wager whatever," and the appellant, if he had paid the money lost by him on the wager, could have recovered it back.

Section 189 of Tiedeman's Commercial Paper employs this language: "The cases are unanimous in the opinion that a contract for the payment of differences in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid." And the author cites a large number of cases in support of his proposition. Neither in text-book nor adjudicated cases have we been able to find a single opposing authority.

But this is the doctrine clearly announced by this court in the case of *Clay v. Allen & Co.*, 63 Miss., 426. Said the court: "Such a proceeding is a wager, and, as such, void only when the real intent of the parties is to speculate in the rise and fall of prices and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract."

Response to the suggestion of error.

Now, the pleas in the case before us distinctly aver just such a wagering contract out of which the note and judgment grew, and are a perfect defense to the action on the judgment, if maintained by sufficient evidence.

Reversed and remanded.

Somerville & McLean, for the appellees, filed a suggestion of error.

WOODS, C. J., delivered the following response to the suggestion of error filed by appellee.

The view contended for in the brief filed with the suggestion of error, as well as the view advanced in the original brief of appellee's counsel, involves the idea of the repeal of § 990 of the code of 1880, by the act of 1882, in so far as dealings in futures were embraced in that section of the code. But there is not the slightest reference in the act of 1882 to § 990 of that code, and repeals by implication are not favored. The repeal by implication must clearly appear in the supposed repealing act, and we fail to find any purpose to repeal any former law by the act of 1882. Rather, it appears to have been the intention of the legislature, by enacting the statute of 1882, to enlarge the existing law. The first section of the act of 1882 makes criminal any dealings in futures, and the second section declares such contracts nonenforceable. But they were already nonenforceable under section 990 and the interpretation placed on that section in *Clay v. Allen*, 63 Miss., 426, and, therefore, this second section of the act of 1882 was, so far as concerns contracts made in this state, idle, and added nothing to the law already long in force. Neither did it, as to such contracts, take anything from that law.

Suggestion is denied.

Statement of the case.

T. J. SANDERS v. THE STATE OF MISSISSIPPI.

1. BILL OF EXCEPTIONS. *Stenographer's notes. Agreement of attorneys.*
Laws 1896, pp. 91-93.

Under the act of 1896 (Laws 1896, pp. 91-93) it is unnecessary that the agreement between attorneys, that the stenographer's notes of the evidence, as written out and filed, is correct, so as to dispense with the judge's signature to the bill of exceptions, shall be indorsed upon the paper so filed; it is sufficient if the agreement is made in writing and filed, even in the supreme court.

2. SAME. *Limit of time.*

The act of 1896, *supra*, does not fix any limit on the time within which such agreement shall be made, and it therefore can be made at any time before the appeal is barred.

FROM the circuit court of Webster county.

HON. C. H. CAMPBELL, Judge.

Appellant was convicted of perjury, and appealed to the supreme court. The bill of exceptions was not signed by the judge, and no agreement of the attorneys in the case in the court below appears in the record certified to the supreme court, but after the record was filed in the supreme court, the following agreement was filed in the cause:

"In this case the record has been carefully examined by T. L. Lamb, acting for the district attorney, Hon. W. S. Hill, at the request of the said district attorney, and by Sam Cooke, one of the attorneys for the defendant, now appellant. And it is agreed by us that the copy of the evidence made by the clerk of the circuit court of Webster county from notes of the official stenographer in said cause, is entirely correct. It is also an agreed fact that the said T. L. Lamb was employed to assist in behalf of the state in the prosecution of said cause, and was

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present during the entire trial, and participated therein on behalf of the state.

“T. L. LAMB,

“*Acting for District Attorney.*

“SAM COOKE,

“*Counsel for defendant, now appellant.*”

The attorney-general, for and in behalf of the state, moved to dismiss the appeal, because (1) the record was not made up within the time allowed by law; (2) the record was not made up within the time allowed by the court; (3) there is no written agreement entered upon the stenographer's notes that the same is correct, as required by law; (4) there is nothing to show that the agreement of the attorneys in the case was entered into within the time prescribed by law.

Wiley N. Nash, attorney-general, for the motion.

Sam Cooke, contra.

WHITFIELD, J., delivered the opinion of the court.

This is a case in which stenographer's notes having been taken, the court allowed sixty days within which they should be filed, from November 14, 1896. The bill of exceptions was not presented to or signed by the judge, but on January 25, 1897, the counsel on both sides filed in this court their written agreement that the copy of the evidence made by the circuit clerk from the notes of the official stenographer in said cause is “entirely correct.” This is very inartificial, but we think it may be fairly treated as an agreement that the stenographer's notes as “originally filed” were correct. It would be too literal a construction to hold that the agreement must be indorsed “on the stenographer's notes”—on the very paper and none other on which they were written. We think the agreement may properly be on a separate sheet. The particular ground of the motion is that the agreement was not made in time; that it ought to have been made in writing within the sixty days. But the provisions of the act of March 18, 1896 (Laws,

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pp. 91-93), with respect to "mailing or expressing bills of exceptions to the trial judge" within sixty or ninety days, relate alone to cases in which the judge is to pass upon and sign such bills. There is no provision in the act expressly limiting the time within which "the agreement of the parties or their attorneys" shall be made in writing, and the act should be liberally construed in that regard, in the absence of such express limitation. It was easy to name a time within which it should be made, if the purpose of the legislature was to fix such a limit, short of the period which would bar an appeal. Nor will anything in favor of the motion follow from the analogy supposed to obtain (as to time within which such agreement must be made) between such time and the time within which bills of exceptions must be mailed or expressed to the judge for his signature. For the reason which chiefly required the judge to sign, within some specified short period, was that the judge might pass upon bills of exceptions before the facts had faded from his memory. But under the new practice, where stenographer's notes are used as the bill of exceptions, and counsel agree in writing that they are correct and shall constitute the bill, no such necessity exists, since such notes, when filed, are a permanent memorial of what the evidence and rulings of the court in the case were. We think this construction in harmony with the spirit and letter of the act. It is not for the court to fix a limit of time, when the legislature fixed none. This construction will not be found to work, practically, any delay, ordinarily, in the making of the written agreement, beyond the sixty or ninety days. For parties, or their counsel, who allow the sixty or ninety days to elapse without mailing or expressing the bill for the signature of the judge, and without making the written agreement, will be wholly at the mercy of each other, a sufficient incentive to see to it, ordinarily, that the written agreement is made within the sixty or ninety days. Wherefore the motion is

Overruled.

Brief for appellant.

WILLIAM WATERS v. MOBILE & OHIO RAILROAD CO.

1. COMMON CARRIER. *Damage to freight. Shipper. Owners. Justice's jurisdiction.*

Where a person ships freight, part of which belongs to him and parts to others, and the same is damaged by the negligence of the carrier, he may sue in tort in a justice's court for the injury to his own property, if the same does not exceed two hundred dollars, and that, too, though the entire shipment was made under one contract with him alone, and the damages to all the property exceed said sum; and, in such case, the fact that the plaintiff has brought separate suits, as agent for the other owners for their damages, will not defeat his individual case.

2. TORT. *Contract. Waiver. Parties.*

The owner of property damaged by a common carrier is a proper plaintiff in an action sounding in tort for the injury, even where the shipment was by and in the name of another. The contract may be waived and suit brought in tort for the gross or wilful negligence.

FROM the circuit court of Monroe county.

HON. NEWNAN CAYCE, Judge.

The facts are stated in the opinion.

Gilleylen & Leftwich, for appellant.

The action at bar, as well as those brought by Kahl and Smithpot, were intended as actions of tort, and not of contract. Appellant and the other owners of the stock on appellee's car had the right to sue appellee in tort as a common carrier. The fact that a contract existed whereby appellee attempted to limit its liabilities and which could be introduced by appellee as defensive evidence, as it did introduce it, did not hinder appellant from suing originally in tort. Appellant could have waived the tort and sued on the contract, but he did not care to do so, nor did the other owners of stock on the car. The existence of the

Brief for appellant.

contract in the record does not hinder appellant from suing in tort if he chooses. (*Clark v. St. L., K. C. & N. R. R. Co.*, 64 Mo., 440 (17 Am. Ry. Rep., 284); *Heil v. St. L., I. M. & S. R. R. Co.*, 16 Mo., 363; *Boos v. Central Railroad Co.*, 87 Ga., 463 (13 S. E. Rep., 711); *Nicoll v. E. T., V. & G. R. R. Co.*, 89 Ga., 260; 1 Rap. & Mack's Dig. of R. Law, sec. 135, p. 802.

The ruling of the lower court is tantamount to saying that appellant should not sue at all for injury to his stock unless he sues on the contract in evidence, which, in so far as appellee attempts to relieve itself from its own negligence, is not binding on appellant. *Express Co. v. Seide*, 67 Miss., 609; *Railroad Co. v. Abels*, 60 Miss., 1017; *Express Co. v. Moon*, 39 Miss., 822; 19 Cent. L. J., 163.

Appellant could not have brought a single action in this case if he had wished, because he could not have said in his declaration that he was owner of all the stock and goods, as he must have done. He could not have said that he was bailee and shipper of all the stock and goods, as he might have done had they all belonged to some one else. He could not have made two inconsistent counts in his declaration—one for the stock he owned, and another for the stock and goods he was bailee for. 1 Enc. Pl. & Pr., 190, 166, 159. The plaintiff must sue in the same right when separate causes of action arise out of the same tortious act. 1 Chitty on Pl., 199, 203.

When stock belonging to different persons is shipped under one contract and each individual brings a separate action, they cannot be afterwards consolidated. *Boughman v. Railroad* (Ky.), 21 S. W. Rep., 757; *Railroad v. Hall*, 2 Ill. App., 618; *Railroad v. Case*, 42 Am. & Eng. R. R. Cas., 537; 122 Ind., 310; 32 N. E. Rep., 797; 1 Rap. & Mack's Ry. Dig., 802, 803, 136, 137.

This court has decided that, in actions of this kind, the owner is the proper person to sue, and the owner alone. *Railroad v. Cantrell*, 70 Miss., 329. The contract or bill of lading

Brief for appellee.

is properly a receipt, and can be varied, explained and contradicted by parol proof. 2 Am. & Eng. Enc. L., 224. Such portions of these papers that have the elements of a contract, if there be any such, constitute an attempt to contract against negligence, and are void as being against public policy. *Railroad v. Abels*, 60 Miss., 101.

Sykes & Bristow, for appellee.

The court will perceive from the bill of lading in the record, that the plaintiff, Waters, entered into a regular "live stock contract" with the defendant railroad company, to which contract the plaintiff signs himself "owner and shipper" of the contents of the car, the "emigrant car" chartered by him, and had the car and its contents consigned to him at Aberdeen. In short, Waters was, with reference to this contract and this defendant, owner, shipper and consignee; he was the only person to whom, under this contract, the railroad company owed any kind of duty or diligence; the company was bound to transport and deliver the car and its contents to Waters, and no one else. Will the court, under this contract, permit several parties, with whom the defendant did not contract, and to whom it owed no duty or diligence, and to whom it was not bound to deliver the car and its contents at all, to come in and split up the contract, and bring several suits in the justice's court for damages growing out of the contract, amounting to more than two hundred dollars?

It is not contended that there has been any transfer or assignment, since the occurrence, of any right of action by Waters to Smithpot or Kahl, or by them to Waters. The contract, with all legal rights thereunder, remains just as it was when it was made. It will not avail plaintiff to claim that his suit is in tort and not on the contract. The whole suit shows the contrary. There is no hint at any wanton or wilful wrong, and, under the contract in this case, the duty of appellee was narrowed. The statutes of this state, as often decided by this court, hold that it is not lawful to split up one single contract into several suits,

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where the adjudication requires an investigation of the same state of facts in every suit, and that such a separation of the cause of action in several suits by the act of the plaintiff will not be tolerated. *Pittman v. Chrisman*, 59 Miss., 124.

STOCKDALE, J., delivered the opinion of the court.

On February 11, 1896, William Waters chartered an emigrant car at Shipman, Ill., to be run by the Chicago & Alton Railroad to East St. Louis, and from there to Aberdeen, Miss., over the Mobile & Ohio Railroad, paying for the through trip in advance. The car was loaded with two horses and one colt belonging to Wm. Waters, and two mules belonging to F. R. Kahl, and three horses belonging to Gus Smithpot, and household and kitchen furniture belonging to all of them. William Waters signed a regular live stock shipping contract with the Chicago & Alton Railroad at Shipman, Ill., and at East St. Louis he signed another such contract with the Mobile & Ohio Railroad, covering the trip of said car from East St. Louis to Aberdeen, Miss., in which contract he appears as shipper, owner and consignee, which he swears he did not know he would be required to sign until he was ready to start, but had to sign or not go. On the car with the stock and goods came the owners. On their arrival at Aberdeen, a day late, the car was side-tracked, and Waters and the other owners took their stock and goods out in, as they claimed, a damaged condition, and so informed the railroad agent at Aberdeen at the time. Failing to effect an amicable settlement, suits were brought before a justice of the peace, in Aberdeen, against the Mobile & Ohio Railroad Company, as follows:

William Waters sued for damage to his two horses and one colt, demanding damages to the amount of \$130.

William Waters, agent for Gus Smithpot, sued for damage to Smithpot's three horses and a stove, demanding \$50.

William Waters, agent for F. R. Kahl, sued for damage to the two mules of Kahl, demanding \$90.

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Judgment was rendered in each case for the amount of the demand, and the defendant, Mobile & Ohio Railroad Company, took an appeal in each case to the circuit court of Monroe County.

At the September term, 1896, of said court, the case of *William Waters v. Mobile & Ohio Railroad Company* was called for trial and the parties proceeded with the trial and introduced a large volume of testimony before the jury, including the appeal papers in the other two cases. And then, after the testimony was all in, defendant moved the court to dismiss the cause "for want of jurisdiction in the justice of the peace court, because plaintiff had split up his cause of action" into three suits. The court sustained the motion, dismissed the cause, and taxed plaintiff with all the costs, and plaintiff appealed. The contention of appellee is, that each of the three suits being predicated on the alleged negligence of the railroad company, in handling the same car of stock and furniture while in transit from East St. Louis to Aberdeen, Miss., furnished but one and indivisible cause of action, and that plaintiff had split that up into three suits, each for an amount within the justice of the peace jurisdiction, but the aggregate of said amounts exceeded the amount over which the justice of the peace had jurisdiction, to wit, \$270; that appellee contracted with Williams Waters, who signed the contract as shipper, owner, and consignee, and defendant knew no one but him, and was and is responsible to no one else, no matter what previous arrangement he might have with others; that Waters cannot abandon his written contract and sue on an implied contract, and even allow others to sue on an implied contract. In short, that the written contract between the railroad company and Waters must control, in every respect, in this case, citing authorities, which we have examined.

The contention of appellant is that he does not sue on the contract, but in tort, for injuries done to his stock by the negligence, mismanagement, and wilful wrong of appellee's servants, while the stock was in its possession as common carrier.

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It is settled in this state that in this class of cases plaintiff may waive the contract and sue in tort (as was done in this case, the defendant introducing the contract in defense). *Heirn v. McCaughan*, 32 Miss., 17; *Railroad v. Hurst*, 36 Miss., 660, and many decisions since then made. It is claimed by appellee that there is no intimation of gross or wilful negligence in the case. The suit was commenced without pleadings in the justice of the peace court, however, and charges of gross negligence did not appear, except in the testimony introduced on the trial, from which, if true, the jury would be justified in believing there was wilful negligence. There must have been great negligence somewhere, as some of the animals were partly flayed upon arrival in Aberdeen, and two died almost immediately. It is maintained by appellee that Wm. Waters chartered the car from Shipman, Ill., to Aberdeen, Miss., and loaded it himself. That being true, the stock of Kahl and Smithpot were rightfully on the train, in the custody of appellant, and, being injured in transit, the carrier is liable to some person or persons. The owner is the proper party to sue in a case arising *ex delicto*. 70 Miss., 329; *Lacoste et al. v. Ann E. Pipkin*, 13 Smed. & M., 589. In the latter case, it is said by the court: "The absolute or general owner (of personal property) having the right of immediate possession, may, in general, support an action for an injury thereto, though, at the time when the injury was committed, the goods were in the actual possession of a servant or other bailee."

There is no dispute by either party that Waters and Kahl and Smithpot were each the actual and absolute owner of a part of that stock, and were entitled to the immediate possession of their respective property, and, as the testimony shows, took possession on their arrival at Aberdeen, and were in actual possession when suit was brought, and, therefore, had the right to sue.

There is no dispute and no question that Wm. Waters could sue for injuries to his own property. He was owner, shipper

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and consignee, and his demand was within the jurisdiction of the justice of the peace, and had he not sued as agent for Smith-pot and Kahl, the motion to dismiss would not have been made. The only question remaining, then, is, did he lose his own right to sue by suing as agent for the others? It is insisted by counsel for appellant that appellant could not have brought a single action, for he could not have asserted in his complaint that he was owner of all the stock, for he was not. He could not have sued as bailee for all, for he was owner of part, and he could not join a count as owner of part and as bailee of part; and, in fact, he was no longer bailee at all, for the owners had possession, and he was not at all injured by the damage to the stock of the other owners, nor interested in recovery for it. *Baughman v. Railroad*, cited below.

Had he brought such suit, he would have been met with the defense that only the owners were damaged and had the only right to sue, and the defendant wanted to interpose different defenses to the suits of different plaintiffs. *Hall v. Fisher*, 20 Barbour (N. Y. Sup. Ct. Rep.), 441.

In *Baughman v. Louisville, etc., Railroad Co.*, 94 Ky., 150, the facts are nearly identical with those in this case. One Weatherford shipped, in the same car, a number of horses from Louisville, Ky., to St. Louis, Mo., and signed a live stock contract with the railroad company as owner and shipper. None of the horses belonged to him, but belonged to four different firms, each firm being the absolute owner of some of them. They were injured in transit by a collision, and each firm brought a separate suit for damages to his own stock, and the defendant moved to consolidate the cases, and the motion was denied. It is suggested that the Kentucky statute figured in this decision, and, in that case, the court does cite in its opinion § 18 of the civil code of Kentucky, as follows: "Every action must be prosecuted in the name of the real party in interest," which is the same as the law is declared to be in this state, in 70 Miss., 329, above cited. The court also quotes § 22 of the Kentucky

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code, as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs"—the same principle that counsel for appellee invokes here.

The court held, however, on a motion to consolidate the four suits, that the shipper, Weatherford, could not sue, for he was the mere agent of each of the firms to which the animals respectively belonged, nor could either one of the four firms have sued for damages to the others. The court held, also, that the four firms could not have sued together in one action, nor were they compelled to bring their actions at the same time, nor in the same court, and they could not be compelled to consolidate.

The tort for which plaintiff sues in this case was the injury to his own stock. He had no interest in the stock of the other men after they took possession, and each had the right to sue for damage to his stock, or not sue, as he might determine for himself. That conclusion reached, the question as to whether the other suits were properly brought by Waters, as agent, or can be maintained, is not before this court. As to this appellant, we can see no just grounds upon which he can be deprived of a trial of his own cause.

The judgment of the court below is reversed, and the cause remanded.

Statement of the case.

M. FRENCH v. CANTON, ABERDEEN & NASHVILLE RAILROAD
COMPANY.

PEREMPTORY INSTRUCTION. *Material evidence.*

A peremptory instruction for defendant ought not to be given at the close of the evidence because of the omission by plaintiff to prove material averments of the declaration, where the plaintiff contends that such facts were proved, and offers, if mistaken, to reintroduce a witness to establish them.

FROM the circuit court of Monroe county.

HON. NEWMAN CAYCE, Judge.

Mrs. French, the appellant, sued the railroad company for the statutory penalty prescribed by § 3561, code 1892, for failing to construct and maintain stock gaps and cattle guards where its track passed through the inclosed land of the plaintiff. When the testimony was closed, and when the court was about to pass upon a peremptory instruction asked for by defendant, a controversy arose as to whether any evidence had been offered showing, or tending to show, that the land was inclosed and that plaintiff was the owner. The plaintiff insisted that such evidence had been offered, and the defendant contended to the contrary. Thereupon, and before the court passed upon the instruction, the plaintiff asked leave to reintroduce a witness and make such proof. To this defendant objected, and the court sustained the objection, saying that the trial had already consumed twenty-four hours, and, while it was much to be desired that the expense to the public in trying the case should not be repeated, yet, to grant the application would be to reopen the case and to retry the cause; that, while the court was very desirous of giving every opportunity to parties of presenting their case, yet, unless some sufficient reason was shown when the parties close their evidence, a case ought to be ended;

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and the peremptory instruction for defendant was given. A verdict having been accordingly rendered for defendant, and a judgment entered thereon, the plaintiff appealed.

Gilleylen & Leftwich and George C. Paine, for appellant.

Mayer & Harris, for appellee.

WOODS, C. J., delivered the opinion of the court.

If the appellant, before offering to reintroduce the witness, J. W. French, upon the conclusion of the appellee's evidence, had already produced testimony showing that the land of appellant through which the railroad ran was inclosed land, and that she was interested in such land as the owner, then the peremptory instruction for the appellee should not have been given. If counsel had, for any reason, inadvertently failed to introduce this brief and simple evidence, as the court thought, or if the stenographer's notes failed to disclose this evidence, though really presented, as appellant's counsel asserted, then the court should have permitted J. W. French to be reintroduced and his evidence submitted on this point as to whether the lands were inclosed and were appellant's property, in which she was interested, although some part of the inclosed land may have been leased to a tenant. The few minutes which would have been consumed in this short and simple examination might well have been given to the further consideration of the case. If the evidence said by the court and appellee's counsel not to have been introduced by appellant before J. W. French was offered to be reintroduced had, in fact, been carelessly overlooked by appellant's counsel, the ends of justice demanded that such omission should be permitted to be supplied, even if the court should be delayed a short time in thus allowing the appellant to show, if she could, that her land was inclosed where the track of the railroad passed through it. The administration of law and the meting out of exact justice are to

Brief for appellant.

be preferred to a parsimonious use of judicial time. It is very desirable to put an end to litigation, but it is infinitely more desirable to have the rights of litigants fully and fairly presented to the court and tried upon the merits of the case.

Reversed and remanded.

LAWRENCE TAYLOR v. THE STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Indictment. Motion in arrest. Code 1892, § 1341.*

Notwithstanding the provisions of code 1892, §§ 1341, 1354, a judgment in a felony case should be arrested if the indictment be so defective that the nature and cause of the accusation is not clearly and fully stated. *Cook v. State*, 72 Miss., 517.

2. SAME. *Malice.*

All indictments for felony must contain the averment that the act was committed with malice aforethought, or equivalent words, otherwise the defect is fatal. *Marxwell v. State*, 68 Miss., 339; *Jesse v. State*, 28 Miss., 100.

3. SAME. *Code 1892, § 1255. Malice.*

An indictment, under code 1892, § 1255, which fails to aver that the poison was mingled with intent maliciously to kill, etc., is defective. Malice must be charged of the intent to kill, etc.

FROM the circuit court of Quitman county.

HON. F. A. MONTGOMERY, Judge.

The facts are stated in the opinion.

Fitzgerald & Maynard, for appellant.

The opinion of this court in *Cook v. State*, 72 Miss., 517, clearly maintains our position. It is well settled that when the indictment is fatally defective this court will, even when no demurrer or motion in arrest is made, quash it. *Kirk's case*, 13 Smed. & M., 406.

The indictment in this cause does not charge that the intent to kill Gibson and others was with malice aforethought.

Brief for the state.

When the charge in an indictment is the intent to kill some human being, the intent must be charged to have been with malice aforethought, or equivalent words. This requirement of law is not complied with in this case, by the charge that the mingling of the poison with the food was maliciously done, and the further allegation that the intent to kill was with "malice aforesaid." *Sarah v. State*, 28 Miss., 267.

The indictment must charge some act or fact, other than the mingling of the poison with the food, indicating the intention of accused to kill Gibson and other persons. It is not a crime to mingle poison with food, which is often done to kill vermin, hence the necessity for charging some act of defendant, other than the mingling of poison with food, so as to distinguish the intent to kill from such mingling without criminal intent. *Jesse's case*, 28 Miss., 100; *Sarah's case*, *Ib.*, 267; *Harrington's case*, 54 Miss., 490; *Connelly's case*, 66 Miss., 96; *Sullivan's case*, 67 Miss., 346; *Maxwell's case*, 68 Miss., 339; *Rawl's case*, 70 Miss., 739; *Barkwell's case*, 72 Miss., 535.

The indictment does not charge that the mixture was a deadly poison or calculated to destroy life. The drug itself is not charged to be a deadly poison, and if it be ever so virulent, it does not follow that the mixture would be likely to produce death. An allegation of an actual poisoning might imply that the means employed was a poison; but an indictment for an attempt to poison does not and cannot so imply. *Anthony v. State*, 29 Ala., 27; *Osborne's case*, 64 Miss., 318.

Wiley N. Nash, attorney-general, for state.

In the court below no objection to the indictment was taken until after verdict, then a motion was made in arrest of judgment.

The sole and single question in this court now is whether the indictment is sufficient after verdict—that is, whether the defects sought to be taken advantage of in this court can be raised in any other way than by demurrer.

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This court is referred to § 1354, code of 1892, which says that all objections to an indictment for defects appearing on the face thereof, shall be taken by demurrer to the indictment and not otherwise, before the issuance of the venire in capital cases and before the jury shall be impaneled in all other cases, and not afterwards, and the court may for any formal defect, if it be thought necessary, cause the indictment to be forthwith amended, and thereupon the trial shall proceed as if such defect had not appeared.

It will be observed that this statute uses these strong terms: (1) all objections (2) shall be taken by demurrer (3) and not otherwise (4) before the issuance of the venire in capital cases and before the jury shall be impaneled in all other cases (5) and not afterwards. For formal defects the indictment can be amended and the trial proceed, from which the inference is irresistible that for a substantial defect the indictment must be quashed and a new one found or the prosecution cease. This shows that the legislature was dealing with substantial as well as formal defects in passing this statute. Our latest decisions on this statute say objections to an indictment for defects apparent on its face must be made by demurrer. *Gates v. State*, 71 Miss., 874; *Norton v. State*, 72 Miss., 128. By an inspection of this statute and a careful reading of the indictment, it will be seen that, in order to sustain this conviction, it is not at all necessary that this party should have intended to murder Gibson or any person, nor is it necessary that he should have intended to kill any one. If the poison was feloniously mingled with the intent to injure, etc., the offense is complete. It will be perceived, however, that the indictment goes much further.

Argued orally by *Wiley N. Nash*, attorney-general, for the state.

STOCKDALE, J., delivered the opinion of the court.

Lawrence Taylor was tried and convicted at the September, 1896, term of the circuit court of Quitman county, on an in-

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dictment charging him (after the formal part thereof) in the following words, to wit: "That one Lawrence Taylor, late of the county aforesaid, on the twenty-first day of September, A.D. 1896, with force and arms, in the county aforesaid, and within the jurisdiction of this court, wilfully, feloniously and maliciously, did then and there mingle a large quantity, to wit, one drachm, of poison, to wit, strychnine, with a certain food, to wit, milk, with intent then and there feloniously, wilfully and of his malice aforesaid, to kill and injure one M. M. Gibson and other persons to the jurors unknown, contrary to the statute," etc. After conviction he was sentenced to the penitentiary during ten years. Defendant (appellant here) moved the court to arrest the judgment in this case and to discharge the prisoner. That motion was overruled by the court, and defendant appealed and assigns that action of the court below as error.

It is urged by the honorable attorney-general that § 1341, code of 1892, intervenes to prevent appellant from taking advantage of his motion to arrest the judgment, because he did not take advantage of it before verdict, as provided in § 1354, code 1892.

The contention of counsel for appellant is, that the indictment does not sufficiently charge any offense known to our laws, and therefore there was and is no indictment in the case upon which the court could sentence appellant for a felony, and that it may be assailed at any stage of the proceedings.

In the opinion of this court, delivered by the chief justice in *Cook v. State*, 72 Miss., 517, it is said of these statutes (§§ 1354, 1341): "The statute was not intended, and could not have been intended, to rob any citizen accused of a felony of his right to have the nature and cause of the accusation preferred against him clearly and fully stated, and any abridgment of the right to be thus informed in any substantial particular would be unconstitutional." It only remains to inquire whether this indictment clearly and fully states the nature and cause of the

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accusation preferred against the accused without abridgment in any substantial particular of his rights to be thus informed.

In *Mazewell v. The State*, 68 Miss., 339, this court said: "The indictment must be quashed, because of the absence of the averment of the defendant's malice. The precise point involved was decided in *Jesse v. The State*, 28 Miss., 100."

This opinion was by the learned Justice Cooper. In that case—Jesse's case—the court say: "We are, therefore, of opinion that the statute does not dispense with the averment of malice, and that the indictment, without such averment, showed no offense in law;" and it was quashed on that ground only.

In *Sarah v. The State*, 28 Miss., 267, the court said: "It follows, necessarily, from this doctrine (the doctrine laid down in the foregoing argument), in all cases of felony, in which malice is the gist of the offense, that the malice must be averred in the indictment; otherwise it will be defective, and the judgment arrested, on motion." And that is what appellant's counsel contend shall be done in this case.

It is well settled in this state that an indictment charging the crime of murder, or the crime of an attempt to murder, must contain the averment that the act was committed with malice aforethought, or equivalent words, otherwise it will be fatally defective.

The honorable attorney-general maintains that from a close inspection of the statute and a careful reading of the indictment, it will appear that the conviction may be sustained, because the indictment must be held good to charge the mingling poison with food with intent to injure, etc., the language of the statute being "to kill or injure." The indictment, however, charges the accused with mingling the poison with intent to kill and injure, and the jury rendered a verdict of guilty as charged, and the court pronounced the extremest penalty allowed by law. It could not be claimed to be an impartial administration of justice to go to trial upon an indictment clearly charging the highest crime and get a verdict of guilty as

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charged in the indictment, and the court pronounced the highest penalty allowed for the highest crime, and then say the lesser crime was well pleaded and the higher penalty must be suffered. We are of opinion that the indictment in this case is fatally defective, and must be quashed.

The judgment of the court below is reversed, and the motion to arrest the judgment is sustained and the judgment arrested; the indictment is quashed and the prisoner ordered to be held for a new indictment.

The attorney-general filed a suggestion of error, which was disallowed.

J. L. JOHNSON v. F. E. JOHNSON.

1. EVIDENCE. *Admissions. Written contract.*

When a party, by admissions, has qualified his right, one who holds under him succeeds only to the right thus qualified, and the admissions are, ordinarily, competent evidence; but evidence of such admissions are incompetent where they contradict the terms of a written contract between the parties.

2. SAME. *Receipt.*

A receipt may embody the terms of a contract for the appropriation of the payment, as well as acknowledge the reception of the money; and the contract features of such an instrument cannot be varied by parol evidence.

FROM the circuit court of Pontotoc county.

HON. NEWMAN CAYCE, Judge.

This was an action of ejectment. One Sappington purchased the land upon a credit from J. L. Johnson, defendant, and the purchase money was secured by a deed of trust on the land, given by Sappington to his vendor. Sappington afterwards sold the land to F. E. Johnson, the plaintiff, and still later the land was sold under defendant's deed of trust; and the defend-

Brief for appellant.

ant, having purchased at the trustee's sale, took possession. The question on the trial was, whether the purchase money for the lands, secured by the deed of trust, had been paid before the trustee's sale, at which defendant bought. Sappington was dead before the trial.

The plaintiff offered in evidence two receipts, shown to be genuine, and which are as follows:

“Received of R. D. Sappington one hundred and seventy and $\frac{5}{100}$ dollars, to be placed to his land credit. Jan. 19, 1887.

J. L. JOHNSON.”

“Received of R. D. Sappington four hundred and seventeen and $\frac{7}{100}$ dollars, to be applied to his land credit and balance to account. Feb. 16, 1888.

J. L. JOHNSON.”

The aggregate of the two receipts was more than a sufficient sum to extinguish the purchase money deed of trust.

The defendant offered to prove, by witness Jones, that after the date of the last receipt, and while Sappington occupied the land, and before he sold to plaintiff, that he (Sappington) admitted and said to witness that he yet owed defendant for the land, and was unable to pay the purchase money, and that the debt therefor was secured by the deed of trust. To this plaintiff objected, and the objection was sustained, and defendant duly excepted. The verdict and judgment being for the plaintiff, the defendant appealed.

Blair & Anderson, for the appellant.

The main contention of appellant is that the court erred in not allowing witness, Jones, to answer the questions propounded to him as to what Sappington told him while he, Sappington, was still in possession of the land and before he had contracted to sell it to appellee. The issue on which the case was fought out in the court below was whether or not Sappington had paid appellant for the land at the time appellee purchased it. The admission by Sappington that he had not done so, made to

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Jones, was therefore material to the issue and of the highest importance. We contend that the testimony was competent as a part of the *res gestæ*, explaining and qualifying his position. The authorities on the subject are numerous. Greenl. on Ev., vol. 1, secs. 108, 109; 59 Am. Dec., 85; 61 Am. Dec., 305; 30 Am. Dec., 591; 27 Am. Rép., 321. Again, we contend it was competent on account of the relation existing between appellee and Sappington—grantor and grantee. The authorities seem to settle the question, and we deem it useless to argue it. See 71 Miss., 66; 30 Miss., 589; 68 Miss., 135; 55 Miss., 671; 70 Miss., 283; 12 Smed. & M., 267; 4 How. (Miss.), 506.

It is said in 4 How., *supra*, that the declaration of a grantor, made after the conveyance, is not competent against the grantee. But, in this case, they were made before the conveyance and while the grantor was on the lands. Rice on Ev., vol. 1, secs. 221–233. For the general rule in reference to the declarations of assignors and vendors, see Rapalje's Dig. Am. Dec. and Am. Repts., vol. 2, p. 1342, where numerous authorities in point are cited.

J. D. Fountaine, for appellee.

The testimony of Jones was properly excluded, because it was an effort to contradict by parol the written evidence of the payment of the purchase money for the land and contract between the parties. When the writing is both a contract and a receipt, the receipt is open to explanation, but the contract does not merge in the receipt, and cannot be contradicted or varied by parol evidence, except as other contracts may be. 19 Am. & Eng. Enc. L., 1123, sec. (a) and notes 5, 6 and 7. And a receipt given for a specific purpose cannot be used for a different purpose, in violation of the object for which it was given. A receipt containing in its terms an expression of the intention of the parties is, to such extent, a written contract, which cannot be varied by parol evidence. 19 Am. &

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Eng. Enc. L., 1124. When a receipt expresses in terms the manner in which the money is to be appropriated, it cannot, on principle and authority, be contradicted in that respect. *Eagleston v. Knickerbacker*, 6 Barb. (N. Y.), 458; *Henderson v. Henderson*, 41 Miss., 584; *Wren v. Hoffmann*, 41 Miss., 616.

WHITFIELD, J., delivered the opinion of the court.

The testimony of R. R. Jones would undoubtedly be competent ordinarily, as the authorities cited in the brief of learned counsel for appellant abundantly demonstrate. See, also, *Graham v. Busby*, 34 Miss., 272. But we do not think it competent in this case, because its effect would have been to contradict the clear terms of the express written contract, for what is called the receipt in this case is more than a receipt. It is a receipt and a contract, and the clause as to the appropriations of the money (\$417.75), "to be placed to his land credit and balance to account," contains a clear, express stipulation as to how the money is to be applied, and an acknowledgment that it will more than discharge the land debt. It was not competent to vary this contract feature by parol. *Swann v. Southern Express Company*, 53 Miss., 286; *Eagleston v. Knickerbacker*, 6 Bar., Sup. Ct. Rep., 466, where it is said: "In the present case the receipts, in terms, express the manner in which the money was to be appropriated. On principle and authority they cannot, in that respect, be contradicted." 19 Am. & Eng. Enc. L., p. 1123, par. 4 (a), and the authorities cited in note 7 especially; *Henry v. Henry*, 11 Ind., 236; *Dale v. Evans*, 14 Ind., 288; *Stapleton v. King*, 11 Am. Rep., 109, and see, also, *Ashler v. Vischer*, 85 Am. Dec., 65, to which we make special reference as directly in point—a case of two receipts, as here (one a mere receipt, and the other a receipt with the same contract feature as the second receipt in this case has) uncontradictable by parol. It not only acknowledges the receipt of the money, as to which it might have been contradicted, but it binds the receiptor to the

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affirmative contract obligation of applying it in the mode pointed out, and admits that, so applied, it would more than discharge the land debt.

Affirmed.

SUSAN RICHARDSON GORDON v. CARNEAL WARFIELD.

74	553
476	486
74	553
79	285

 1. CHANCERY COURT. *Jurisdiction. Nonresidents. Unliquidated demand.*

The chancery court has jurisdiction of a bill for relief filed against a nonresident of the state, having property here, to redress a wrong, even if the damages suffered by complainant are unliquidated.

 2. SAME. *Depositions. Code 1892, § 1752.*

Depositions taken without notice are not receivable in evidence. If the adverse party be nonresident, notice of the taking of depositions should be served on him, as provided by code 1892, § 1752, by filing the notice or interrogatories with the clerk for the time required. This section applies to depositions for use before masters in chancery, to whom the cause has been referred, to state an account between the parties.

FROM the chancery court of Washington county.

HON. A. H. LONGINO, Chancellor.

The facts are sufficiently stated in the opinion.

Yerger & Percy, for appellant.

The decree appealed from in this case is a startling illustration of the progressive and innovating spirit of the age, the tendency of which, when carried into our courts, is to disregard established rules of jurisprudence, and to lightly set at naught limitations as to jurisdiction, based on wisdom vindicated by the centuries, and crystallized into precedents as innumerable as the judicial tribunals of civilization. There are four principles which seem to effectually bar recovery by appellee in this proceeding: (1) Where proceedings *in rem* have

Brief for appellee.

been adopted in the chancery court they have been largely, if not entirely, due to statutes; (2) the mere fact of the nonresidence of the debtor, and inability to obtain judgment against him, does not create jurisdiction in a case where it does not otherwise exist; (3) when equity attempts to proceed *in rem*, it does so by a precedent seizure of the property, or in some method equivalent to a seizure; (4) equity has never exercised its remedies for the enforcement of a claim for unliquidated damages arising *ex delicto*.

The decision in the case of *Dollman v. Moore*, 70 Miss., 267, does not render untenable any one of our four propositions. While that case overturned what had been regarded as established principles of jurisdiction, yet the broadest construction of that case falls far short of warranting appellee's contention. To apply that case to the one at bar, is to extend it infinitely beyond its reason and proper limits. *Zachery v. Bowers*, 1 Smed. & M., 584, s.c. 3 Smed. & M., 641; *Comstock v. Rayford*, 1 Smed. & M., 423; *Gasget v. Scott*, 9 Yer. (Tenn.), 244; *Pomeroy's Eq. Jur.*, sec. 1317; *Beach's Eq. Jur.*, sec. 6, *et seq.*; *Arndt v. Griggs*, 134 U. S., 316; *Brennan v. Burke*, 6 Rich., 200; *Farrar v. Haselden*, 9 Rich., 331; *Banks v. Paine*, 13 R. I., 592; *Steene v. Hoagland*, 39 Ill., 264; *Cudabac v. Strong*, 67 Miss., 705; *Hart v. Samson*, 110 U. S., 151; *Story's Eq. Jur.*, 794 and 794a.

The decree appealed from is erroneous, in that notice was not given by the master to appellant of the taking of testimony as to the damages claimed. Nonresidence of appellant did not exempt the master from giving the notice of which the nature of the case admitted. Certainly he should have filed the notice in the papers. § 1752, code 1892. Appellee probably went on the idea that not being governed by statute he enjoyed peculiar rights, and should not be hampered by rules of practice.

Frank E. Larkin, for appellee.

The case made by appellee and confessed by appellant, shows

Brief for appellee.

an injury done the former by the latter, for which no remedy is given, unless a court of equity will give life and force to the maxim, "Wherever a legal right has been infringed, a remedy will be given." Equity jurisprudence is founded on this maxim, and, wherever a right recognized by the municipal law has been infringed, the extent of jurisdiction of a court of equity is determined by this maxim, the only force of which is its supposed universal application. Pomeroy's Eq. Jur., vol. 1, sec. 423 *et seq.* This maxim can have no force unless it be applied to confer power on courts of equity, in cases where rights recognized by the municipal law have been infringed, to grant appropriate relief.

Appellee contends that never yet has a court of equity refused to grant relief where a municipal right has been infringed. In this case, a legal right of complainant has been infringed; an injury has been done him by defendant, for which a circuit court, if it had jurisdiction of his person, would undoubtedly give compensatory damages. But defendant is beyond the reach of process of that court. The statutory methods provided for a surer collection of debts due by nonresident debtors and the recovery of damages for breaches of contracts against nonresidents by attachments at law and in chancery, are denied complainant, for the reason that the damages suffered by him are unliquidated, and the statutes fail to provide a remedy in this class of cases. But, independent of statutory modes for obtaining relief, a court of equity, by force of the maxim alluded to, has inherent power and jurisdiction to afford the relief prayed for by complainant.

In *Zecharie v. Bowers*, 1 Smed. & M., 589; s.c. 3 Smed. & M., 641, complainants showed that defendant was a nonresident of the state; that he was indebted to complainants; that he owned lands in this state, and prayed to have the lands sold to discharge the debt. A decree *pro confesso* was taken, and, the cause being set down for final hearing, the bill was dismissed. On appeal, the decree of the lower court was affirmed, and the

Brief for appellee.

ground for affirmance was the failure of the complainant to proceed in the manner pointed out by the statute for an attachment in chancery. Many years afterwards, by the case of *Dollman v. Moore*, 70 Miss., 267, the case of *Zecharie v. Bowers* was overruled, and this court says the decree should have been for the complainants. The reason given for the decision is the inherent power of a court of equity to grant relief where rights recognized by the municipal law have been infringed and the law provides no remedy. The cause was brought to collect a debt, and the justice who delivered the opinion of the court, in vindication of the boast, "*Ubi jus, ibi remedium*," says: "It would be a surprising condition of affairs if a nonresident debtor, owning property in this state, to creditors resident here, could never have been compelled to pay his debts by the courts of this state, exercising their common law jurisdiction. The authorities are numerous that, under such circumstance, resort may be had to equity in the first instance."

Mayer & Harris, on the same side.

The case of *Dollman v. Moore*, 70 Miss., 267, settles the rule of practice in this state, that independent of the statutory attachment in chancery against nonresidents, there is a jurisdiction in courts of equity to afford relief to one who is otherwise without remedy at law, and that case would be conclusive of the one at bar, if it were not for the fact that in the case at bar the demand of the complainant is for unliquidated damages, and, therefore, the question is presented whether the principle of *Dollman v. Moore* will be extended to a chancery attachment where the demand asserted is for unliquidated damages. Our contention is that the same principle includes this case.

We refer the court on this question to the various cases cited in *Dollman v. Moore* on page 275. None of them were cases where recovery was based on unliquidated damages, but the reasoning of the cases all tends to show that their principle would be applicable to a case of that sort if the appeal to chan-

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cery is the only recourse of the complainant. The absence of any other method of relief is that which confers the equity jurisdiction. In this state an attachment at law, which is purely statutory, cannot be maintained where the demand is based on unliquidated damages, but the equity jurisdiction, lying outside of statute and resting upon the general powers of the equity courts to give relief in case of just demands otherwise without value, is the power appealed to in this instance, and the cases cited, as above stated, go to show the existence of that power.

STOCKDALE, J., delivered the opinion of the court.

In November, 1895, Carneal Warfield exhibited his bill of complaint in the chancery court of Washington county, alleging ownership for many years, in himself, of Highland plantation, near Greenville, in said county, having inherited the same from his father. That on said plantation are two lakes, Rose lake and Cypress lake; that north of and adjoining Highland plantation is Lagrange plantation, owned by Mrs. Susan Richardson Gordon, the southern line of which is on the north side or boundary of Cypress lake.

That the rain water which falls on these plantations, and seepage water from the Mississippi river, when high, go into these lakes, but, until obstructed, the waters from these lakes escaped through a natural water course, through LaGrange plantation, into Cypress brake, and thence away from said plantations, and did no harm to the surrounding lands. The water course is entirely on the lands of defendant below (appellant here), and is about four hundred yards long. When these lakes are low that channel becomes dry, but when Cypress lake contains a large quantity of water, a swift current and bold stream flows through said channel. That during his ownership of Highland plantation, and of all previous ownerships thereof within the memory of man, said lake has been drained by said channel, and the right to Highland plantation to have that

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drainage water course was never denied, but always recognized, by the owners of Lagrange plantation.

That in the spring—in April—of 1892, appellant, the owner of Lagrange plantation, wrongfully put a dam across said channel and water course, on her own land entirely, after appellee had planted his crop of corn and cotton, and thereby caused Cypress lake to overflow one hundred and thirty-five acres of appellee's tillable land, disregarding the protest of appellee then and there made, and destroying the crop for that year on said one hundred and thirty-five acres of land.

That said appellant has persistently maintained said dam or levee across said water course ever since, over the protest of appellee, and in disregard of his demands to have the same removed, and by said wrongful act of appellant, appellee has been deprived the use of one hundred and thirty-five acres of his tillable land for four years, worth, in rental value, seven dollars per acre for each year. And that said lands have been damaged by wild growth thereon and filling of ditches, and that he has been damaged \$3,750 damages to his lands by the wilful wrongs of appellant.

That appellant (defendant below) is a nonresident of this state; that Lagrange plantation (another plantation of defendant's) is situated in Washington county, Mississippi; that the damages aforesaid and complained of are unliquidated; that an attachment cannot be maintained; that complainant is without remedy to subject said property to the satisfaction of his demand or to get redress for the injury complained of except in a court of chancery.

Publication was prayed to bring in the defendant, as a nonresident, and that, upon a final hearing, the Lagrange plantation and other lands of defendant be subjected to the payment of the damages to be ascertained. He also prays for a writ of injunction ordering the defendant to remove said obstruction from across said waterway, and that the same be removed by order of the court.

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An affidavit was filed in the clerk's office, in pursuance of the statute, alleging the nonresidence of the defendant, Susan Richardson Gordon, who resides in the city of New Orleans, in the State of Louisiana, at No. 4109 St. Charles avenue, and that her post office box was 723, in the post office in said city. Upon filing the bill and affidavit, summons issued and publication was made and proved according to law.

On the tenth day of March a decree *pro confesso* was rendered treating defendant as in court and subject to its jurisdiction. Testimony was taken, and, on the twenty-first day of March, 1896, a final decree was rendered upon bill and *pro confesso* and appointing a master to take testimony. On the twenty-fifth day of March, 1896, a decree was rendered confirming the master's report, and that unless defendant pay complainant \$2,200 (amount reported) and costs by a day fixed, that the lands described in the bill be sold, etc.

At that stage of the case defendant below appealed the cause to this court.

The question to be determined here is, whether, under the general principles of equity, the decree of the court below should be upheld. The scope of the bill of complaint is to the effect that appellant owns and possesses large landed estates in Washington county, Mississippi, and so uses one of her plantations, by obstructing a natural water course, as to destroy the use of one hundred and thirty-five acres of fine productive lands of an adjoining plantation, and has wrongfully injured and damaged thereby, a citizen of said county to a large amount, and still persists in continuance of such wrong.

There is no question, so far as is shown in this case, that appellee has the right to enjoy his property as nature made it, with its natural outlets and natural water courses open for drainage. There is no question that his rights have been invaded. There is no question but that the law provides a remedy for the protection of his rights, and that any citizen of the state (or of any state, who would come within its borders and

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submit to the jurisdiction of its courts) must answer for the invasion of his rights. And the only and sole defense that appellant deigns to make to demands and protests of appellee, to be protected in the enjoyment of his property, is that she is out of reach of the courts where her property is situated, and whose protection she invokes for the same property which she uses to destroy the neighboring property.

When appellee invokes the aid of the equity courts of the state, to protect him in his right of enjoyment of his property, the appellant who has committed the wrong upon him is startled at the illustration by the chancery court of the progressive and innovating spirit of the age, because, and because only, she is out of reach of the courts of this state.

The learned and elaborate brief of the able counsel for appellant admits there is no remedy at law for such wrongs, and boldly maintains that there is none in equity and should be none anywhere; that to give a remedy in such cases is to disregard established rules of jurisprudence, and to lightly set at naught limitations as to jurisdiction, based on wisdom, vindicated by the centuries and crystallized into precedents innumerable.

The learned counsel for appellee as earnestly maintains that a citizen, suffering under wrongs persistently and wilfully inflicted, ought to have relief, by some means, invoking the maxim, "Wherever a legal right has been infringed, a remedy will be given;" and that the only possible remedy is in the exercise of the equity powers lodged in the chancery court. The facts, as set forth in the bill in this cause, present a strong appeal for relief, if it can be granted.

The argument of counsel for appellant is directed to the question of jurisdiction, aiming to show that the chancery court is without power to grant relief in the premises. We think the case of *Dollman v. Moore*, 70 Miss., 267, settles that question, and that, upon the state of facts presented by the bill and confessed, the chancery court has full jurisdiction in the premises

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to grant such relief as equity may demand upon the final hearing of the cause.

Counsel for appellant make the point that no notice was given, and no attempt was made to give notice, to appellant of the time and place of taking the testimony before the commissioners by whom the damages were established. No appearance was entered for defendant. Section 1750, code 1892, provides for ten days' notice to the opposite party, to take depositions of witnesses in this state. Section 1751: Interrogatories may be filed in the clerk's office for ten days, and the opposite party served with copy, in order to take depositions of witnesses out of the state. Section 1752 provides: "If the opposite party does not reside in the state, or if his residence is unknown, . . . it shall be sufficient to file the notice or interrogatories with the clerk, among the papers in the cause, for the time required."

There seems to be no provision for taking testimony without some sort of notice to the opposite party. No notice was attempted to be given in this case, as stated by counsel; on the contrary, the master says, in his report, that he gave notice to counsel for complainant, but could not give notice to defendant because she was a nonresident, whereas the papers in the case, show that she lived in the city of New Orleans, by an affidavit, giving the number and street of her residence and the number of her post office box, so that there was no excuse for not giving the notice as required and prescribed by the statute. Depositions taken without notice will be rejected (*Daniel's Chy. Plead. & Prac.*, vol. 1, 951), and notice cannot be supplied by the commissioners' adjournment to a day fixed. *Id.* Notice to nonresident by filing in clerk's office (*George's Digest*, 187), applies to all the courts in the state. Want of notice of time and place cause suppression of depositions. *Daily v. Johnson*, 48 Miss., 246.

In *Ellis v. Jusynsky*, 5 Cal., 444, the court says: "The order to take testimony of Scranton should have specified the notice to be given to the adverse party. A deposition taken

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upon an order without such notice, where the opposite party has not had reasonable notice, ought not to be read in evidence.”

In *Garnet v. Yoe*, 17 Ala., 78, the same rule is laid down. 5 ADL. & ENG. ENC. L., 592.

The authorities seem abundant and conclusive that depositions taken without notice to the opposite party cannot be read in evidence as a general rule. That no motion was made in the court below to suppress them cannot figure in this case, as the master was appointed on March 21, 1896, and he took depositions without notice on March 23, 1896, and a decree confirming and adopting the report was rendered on March 25, 1896. It follows, therefore, that the depositions in this case, so taken, ought not to have been considered in the court below, and that nothing based upon them can be sustained. There is no other testimony in the record.

The judgment of the court below is affirmed in rendering the decree *pro confesso* in the cause, and that decree is sustained, and the judgment is reversed as to the final decree, and decree confirming the master's report, decree ordering the payment by defendant of money to complainant, and ordering the sale of lands, and all of said decrees and all proceedings after the decree of *pro confesso* are set aside and vacated and the cause

Remanded.

Brief for appellant.

E. D. PITTMAN v. GEORGE K. HOPKINS ET AL.

ASSIGNMENT FOR CREDITORS. *Judgment creditors. Costs and fees. Receiver.*
Code 1892, ch. 8.

An assignee and receiver, under code 1892, ch. 8, where the assignment is made after the rendition and enrollment of a judgment against the assignor, is not, as against the judgment creditor, entitled to withhold commissions, costs, and fees, incurred in resisting such creditor's demand, out of the proceeds of the assigned property.

FROM the chancery court of Wayne county.

HON. N. C. HILL, Chancellor.

The decree of the court below awarded the entire fund to the judgment creditors, the same being insufficient to satisfy their claims. The judgment creditors, however, entered a remittitur of \$31.57, which amount they contended covered the expenses and fees of the receiver in converting the assigned property into money, and was equal to the fees to which the sheriff would have been entitled had he made sale of the property under executions. The other facts are sufficiently stated in the opinion of the court.

T. A. Wood, for appellant.

It is contended by appellees (1) that the cross petitioners, by virtue of their judgment lien, had the prior right to have the funds, or so much thereof as was necessary, first applied to the satisfaction of their judgments; (2) that the receiver took possession of said property with the knowledge of their lien, and on that account had no right to claim any credit or reimbursements in and about the converting of said property into money, and cite authorities in support of their contention. But it will be seen that all such authorities apply to liens

Brief for appellees.

by mortgages, deeds of trust and pledges, and the reasons in support of such rulings can have no force in a case like the one at bar. In case of a judgment lienor he cannot enforce his lien without resorting to the assistance of an officer, and in that event the officer would be allowed reasonable expenses for keeping personal property levied on by him, and the same shall be taxed as cost, and the officer may retain the same out of the money arising from the sale of the property.

“The court did not allow the receiver any fees or cost whatever, but the appellees entered remittitur in the court below of \$31.57, which they say covered all cost incurred by the receiver that would properly have been incurred by the sheriff in making the sale under execution.”

The sheriff would have been entitled to, in addition to the items included in said remittitur, the following: (1) Reasonable expenses for keeping said property, (2) taking inventory of goods, (3) receiving and returning execution, (4) for levying execution, (5) for making report. The relief asked for by the receiver is no more than just and equitable.

Cochran & Bozeman, for appellees.

The question in the appeal is, whether or not a judgment debtor can, by a general assignment of his property which is subject to judgment liens, charge the property so incumbered with the costs incurred by the assignee in administering the assignment, under chapter 8 of the annotated code, including compensation to himself and attorney's fees, to be paid prior to the judgment liens, where the proceeds of the assigned property are insufficient to satisfy the judgment liens, and where the judgment creditors protested against the assignment.

(1) The assignee takes the property subject to all valid liens and incumbrances on it, and receives no greater interest in the property than the assignor had. (2) The assignor could not make a sale of the property so as to effect a valid lien on it. Hence, the trustee or assignee cannot, in his effort to pay un-

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secured debts, incur costs that can be paid out of the proceeds of the property upon which the lien exists, so as to deprive the lien holder of the amount of such costs. (3) The court cannot confer a right on the trustee to appropriate any of the property on which the lien exists, to the payment of such costs, to the prejudice of the lien holder. (4) The trust estate is nothing but the interest the assignor had in the property when the assignment was made. 2 Jones on Mortgages, sec. 1708; *Lithauer v. Royle*, 17 N. J. Eq., 40; *Kentucky National Bank v. Bagging Company*, 33 S. W. Rep., 106.

WOODS, C. J., delivered the opinion of the court.

On the first day of February, 1894, one D. M. McRae executed a general assignment for the benefit of creditors, with preferences, and named the appellant as assignee. The latter accepted the appointment, filed his petition and bond in the chancery court, and became its receiver, and proceeded to administer the assigned estate and to execute the trust confided to him.

Some three or four months prior to the date of the assignment, however, the appellees had obtained judgments against the assignor, in an aggregate sum which was greater than the total value of the assigned property, and these judgments (as very clearly appears from the bill of exceptions and transcript before us), had been duly enrolled, on the proper judgment roll, some months prior to the execution of the assignment. In addition, executions had been issued on these enrolled judgments, and placed in the hands of the sheriff of Wayne county for levy before the assignment was made. It is needless to say that, as there were no other judgment liens or other incumbrances of any sort on the assigned property at the date of the assignment, and, as the assignor was perfectly aware of the judgment liens of appellees when he undertook to put his property beyond their reach, and prevent the satisfaction of their liens, and, as the assignee had record notice of the liens when

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he accepted the trust and entered upon its execution, and actual notice soon thereafter, the rights of these judgment lienors were not affected by the efforts of the assignor or assignee, or both, to postpone their satisfaction to that of the demands of the unsecured but preferred creditors.

The only real question, therefore, for our determination is, can the assignee, who knowingly accepted this trust, which should not and could not have been executed as attempted to be created by the assignor, and who contested with these judgment lienors their indisputable rights in the premises, and who finally lost, be permitted to charge the costs and expenses incurred by him in his effort to secure the property conveyed in the assignment to the preferred and unsecured creditors of the assignor, against the fund derived from the sale of that property? In other words, shall the costs and expenses needlessly incurred by the assignee, in litigation hostile to the judgment creditors, be wrung out of them, or shall the unsecured creditors, for whose interests the assignee accepted the trust and endeavored to execute it, be made to indemnify the assignee? The latter, manifestly. If it be objected that the assignee cannot now save himself harmless by going upon the unsecured creditors in whose behalf he fought, the answer to the objection is that it was his own folly which plunged him into unjustifiable costs and expenses, without first requiring the unsecured creditors to give security for his indemnity.

The remittitur entered by appellees for \$31.57 gives to appellant all that he was entitled to receive, viewing his right to any costs and commissions most favorably.

Affirmed.

 Brief for appellant.

W. H. KOLB v. J. E. BENNETT LAND COMPANY.

 1. AGENCY. *Unilateral agreement. Nudum pactum.*

An agreement appointing an agent to sell land, the terms of which seek to bind only one of the parties thereto, is unilateral, and, until performance under it, without consideration. One may, at pleasure, ignore a nude promise.

 2. SAME. *Land broker. Commissions.*

Such an agreement, where the owner himself sells the land before the agent finds a purchaser, cannot be made the basis of a suit by the agent for the commissions promised by its terms.

FROM the circuit court of Monroe county.

HON. NEWMAN CAYCE, Judge.

The facts are stated in the opinion of the court.

Gilleylan & Leftwich, for the appellant.

The principal has himself the right to sell without liability for commissions. 2 Am. & Eng. Enc. L., 584, and notes; *McClane v. Paine*, 49 N. Y., 561 (10 Am. Rep., 431); *Packing Co. v. Farmers' Union*, 55 Cal., 606; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y., 378 (38 Am. Rep., 441). See *Stewart v. Murray*, 92 Ind., 543 (47 Am. Rep., 167), in which the authorities on this point are reviewed by the court. The contract is unilateral, without mutuality and supported by no consideration, and not enforceable. When it is admitted that Kolb had the power and right to sell and revoke the contract, appellee's case is lost, for when there is a revocation the contract is canceled which carries with it the right to commissions. All the authorities hold that to entitle a real estate broker to commissions, he must produce a purchaser able, ready, and willing to buy the property at the price and at the terms named in the contract. He must earn his commissions, must be the

74	567
183	856
74	567
188	768
74	567
190	892

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procuring cause of the sale. *McGavock v. Woodleif*, 20 Howard (U. S.), 221-227; *Walker v. Osgood*, 98 Mass., 348 (93 Am. Dec., 168, and notes); *Moses v. Bierling et al.*, 31 N. Y., 462; 2 Am. & Eng. Enc. L., 582; Mechem on Agency, sec. 965.

Houston & Reynolds, for the appellee.

Appellant defended, in the court below, on the ground that he, as owner, had the right to sell his own land, and could revoke appellee's authority and could himself sell at any time. It was admitted that he did not expressly revoke, but contended that he revoked the contract by implication by deeding the property to King. The question in this case is one of the right to commissions under the particular contract sued on in this case. It says: "I hereby appoint J. E. Bennett Land Company as my agents to sell said land, to the exclusion of all others." Counsel further contend that Kolb had the right to revoke the authority at any time, because not coupled with an interest and not conferred for valuable consideration. This assumes that the principal has not parted with this very right by his contract. In all the cases cited by counsel for appellant no time was fixed by the contract.

CALHOON, Sp. J., delivered the opinion of the court.

Mr. Kolb signed and delivered to Mr. Jackson, an agent of the land company, an instrument in writing in these words: "This is to certify that I am owner in fee of the following lands (describing them), and that I hereby authorize and appoint J. E. Bennett Land Company as my agents to sell said lands, to the exclusion of all others, with the express understanding that they shall have a commission of ten per cent. of the consideration, when cash payment is made, regardless of who effects the sale, the following price and terms to govern said sale: \$2,425 cash; terms easy. Deferred payments to draw interest at the rate of eight per cent. per annum, payable annually, all payments to be made on or before —. Said sale

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to be effected within a period of January 1, 1896. I further agree to assist said J. E. Bennett Land Company in selling said land at the price named above, and to execute deed and furnish abstract of title showing said land clear of all incumbrance, on demand and in compliance with above terms. In witness whereof I have hereunto subscribed my name, this twelfth day of April, 1895."

Before January 1, 1896, and without notice to the land company, Kolb sold his lands himself for \$2,000, one-third cash and the balance on time. The land company sued him for 10 per cent. commissions on the amount paid and agreed to be paid Kolb by his vendee. The land company had taken steps to obtain purchasers, had advertised, had taken persons to see the property, and thought it would have effected a sale to one of them. .

At the trial Kolb moved to dismiss, because the action was on the written contract instead of being for damages, and for want of jurisdiction in the justice's court, the plaintiff having reduced the claim from \$242.50, the contract sum, to \$200. Kolb sought to testify that, before he signed the contract, Jackson, the agent of the land company, told him it did not prevent him (Kolb) from himself selling at pleasure without commissions in such case to the land company, but the court refused to permit him to do so, and finally it gave the jury a peremptory instruction to find for the land company.

The stipulations by Kolb were purely unilateral. The land company was not a party to the power of attorney. It paid no consideration. It entered into no correlative obligation. If it had taken no step whatever in the execution of the purposes of the agency, it would not have incurred any liability to Kolb. He could not have sued it for damages for nonperformance. If it had obtained a purchaser, even with the assistance of Kolb, ready and willing to buy, then its rights would have been perfect under contract sustained by an executed consideration. Under the agency it may have had a claim for reim-

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bursenment for expenses and trouble incurred in its prosecution up to the time of notice of revocation. But it does not sue for this, and we do not decide it. It sues on the alleged contract as if it were a party to it, and as if it were based on consideration.

An agent may proceed in the execution of such a power, or not proceed, as he chooses, and, if improperly thwarted by his principal, may, in a proper case, recover damages, but he cannot proceed under the stipulations of the power for commissions upon sale by the principal, which was itself a revocation of the agency. In this case the land company brought nobody to Kolb ready and willing to buy. It asked no assistance from him in negotiations with any probable purchaser who bought. Kolb found his purchaser, and sold without any suggestion from it. The object of the power was that the land company might effect a sale with or without the assistance of Kolb. Until it effected this, with or without Kolb's aid, it was entitled to nothing under the writing as a contract, unless because of the fact that, by its terms, the agency was exclusive and for a fixed term, and entitled it to commissions "regardless of who effects the sale," for which promise on the part of Kolb no consideration was given. One may, at pleasure, ignore a nude promise, and deal with the subject of it as he sees fit, with no other liability save that for damages in the way of expenses, etc., incurred in the prosecution of the subject of the promise before notice of its revocation. The object of notice of revocation is to stop these damages.

Nothing is better settled in the law than that an authority to sell land, when not coupled with an interest, may be revoked at the will of the principal. Am. & Eng. Enc. L., 2d ed., 1216, and authorities cited in note 3. Nothing is better settled than that the phrase "coupled with an interest," means an interest in the thing sold (*Ib.*, 1218, note 1), or than that a commission out of the proceeds of a sale to be made, is not such an interest (*Ib.*, notes 3 and 4), and the sale of the property by the prin-

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principal is a revocation (*Ib.*, 1219, note 3). It is equally well settled that revocation of such authority may be made by the principal at his own pleasure, though the terms of the appointment declare that it shall be "exclusive" or "irrevocable." Mechem on Agency, sec. 204, and notes 3 and 4 thereto. All these propositions are removed from debatable territory. They are based on the ground of want of consideration. They can be based on no other. This express reason is given by Chief Justice Waite, speaking for the supreme court of the United States. U. S. Supreme Court Rep., vol. 125, p. 342, in *Walker v. Walker*.

In *Walker v. Denison*, 86 Ill., 142, the power contained these clauses:

"And said attorneys are to account to me for one-half of the net proceeds derived from the above sales, after deducting all necessary expenses therefrom. And this power of attorney is not revocable, and cannot be revoked within two years from this date."

The power was to sell patent rights in a prescribed territory. The principal sold without notice of revocation to the agent. The court held the principal could do this, on the express reason that "there is no undertaking on the part of Walker (the agent) in the instrument."

In *Stensguard v. Smith*, 43 Minn., 11, the power was, "In consideration of L. T. Stensguard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensguard the exclusive sale, for three months from date, the following property." It then describes the lands and states the commissions. The agent immediately took steps to effect a sale, by advertising and by personal solicitation of purchasers. But, in one month after executing the instrument, the principal himself sold the land. Nevertheless, the court sustained the right of the principal to sell, and said, speaking of the instrument, "This alone was no contract, for there was no mutuality of obligation: The plaintiff (the agent),

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did not by this instrument obligate himself to do anything, and, therefore, the other party was not bound," and the court denied the agent any compensation whatever, even for expenses; and said further, as to the agent: "He can recover nothing for what he did unless there was a complete contract, in which case, of course, he might have recovered damages for its breach."

On this requirement of mutuality, we refer also to *Stier v. Imperial Life Ins. Co.*, 58 Fed. Rep., 847; *Blackstone v. Buttermore*, 53 Pa. St., 266; *Wilcox v. Ewing*, 141 U. S., 627; Story on Agency, sec. 476; *McGregor v. Gardner*, 14 Iowa, 326; *Chambers v. Seay*, 73 Ala., 372.

It follows that the contract in the case at bar was without consideration, and did not prevent Kolb from dealing with his property as he saw fit.

The court erred in giving the peremptory instruction for plaintiff and in refusing a peremptory instruction for defendant.

Reversed and remanded.

E. C. BOYLE v. J. T. MANION.

1. INTERPLEADER. Code 1892, § 714.

A defendant, when sued upon a contract made with the plaintiff for the price of timber cut from land, can, under code 1892, § 714, interplead a third person who claims ownership of the land and of the trees cut therefrom.

2. SAME. Evidence. Title to land.

In such case, the party interpleaded should be permitted to show title to the land from which the trees were cut, and that plaintiff had no title thereto.

FROM the circuit court of Sunflower county.

HON. R. W. WILLIAMSON, Judge.

The facts are stated in the opinion of the court.

Brief for appellees.

J. Holmes Baker and C. C. Moody, for appellants.

The only question is, whether § 714, code 1892, is applicable. It is doubtless true that at common law interpleader was only permissible where both parties claimed the subject of the action under one and the same contract; but, whatever may have been the rule at common law, it seems to us that under said section the matter in dispute in this cause was properly a subject of interpleader. The court will bear in mind that at common law the courts of this state had already jurisdiction of interpleader as it was known at common law, and said section was intended either to define, restrict or enlarge the jurisdiction as it then was. That it was the intention of the legislature to enlarge the scope of interpleader is apparent from the succeeding section (718), where the provisions of § 714 were made applicable to any action brought against a sheriff or any other officer for the recovery of personal property taken by him under execution or attachment, or for the proceeds of property so taken and sold by him.

If it be that interpleader was intended to prevent a multiplicity of suits, and that it was the intention of the legislature to enlarge the scope of interpleader as it was known at common law, then it is apparent that it was the intention of the legislature that there should be no conceivable case where two parties who claimed the same subject-matter of any action, by contract either expressed or implied, could not have their right or claim thereto adjudicated in one suit.

Southworth & Stevens, and *J. T. Manion*, for appellees.

This suit involves the construction of § 714, code 1892. The intention of the statute was not to enlarge the right of interpleader as defined and known at common law, and certainly not to extend it beyond its limits as prescribed in equity.

In this case, appellees claim the money, under contract with Dockery, for timber at two dollars per thousand feet, whilst appellants can only claim the value of the timber as in trover.

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The parties must be in privity of law, estate or contract. Even in equity, a bill of interpleader will not lie by a debtor against his creditor and a third person who claims the debt, but whose claim is not through privity with the creditor but by title paramount. *Third National Bank v. Skillings, etc., Co.*, 132 Mass., 410. Dockery, having cut the timber under contract with appellees, is not a mere stakeholder. Interpleader will not lie if the party seeking it has to aver that, as to some of the parties, he is a mere wrongdoer. *Waite's Actions & Defenses*, vol. 4, p. 157.

STOCKDALE, J., delivered the opinion of the court.

This case was tried in the circuit court of Sunflower county, on appeal from Justice of the Peace Holt's court. The issue being between plaintiffs below (appellees here) against E. C. and Clarendon Boyle, claimants of a fund paid into court by W. A. Dockery, original defendant, who had been discharged upon affidavit for interpleader.

The fund paid into court by the defendant was \$57.19. Both parties claimed it. There was no contention about the amount, nor about identity. Each party contended for the same \$57.19 of money then in court awaiting the result of the contentions.

The parties filed an agreement of facts in the cause, as follows, to wit: It is admitted by and between J. T. Manion, attorney for the plaintiff, and Baker & Moody, attorneys for the claimant, that, for the purposes of this suit, and none other, that the money in the hands of the court, being the same in controversy, is the proceeds of timber cut off the west $\frac{1}{2}$ of the southwest $\frac{1}{4}$ of section 31, township 22, range 4, west, in Sunflower county, Mississippi. Thereupon the defendants or claimants offered evidence to prove title in themselves to said west $\frac{1}{2}$ of southwest $\frac{1}{4}$ of section 31, township 22, range 4, and that plaintiffs had no title to the land. The court, on objection, refused to allow claimants to make such proof, and rendered judgment for plaintiffs; that they have judgment for

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the \$57.19 in the hands of the clerk, and the clerk pay the same over to them. Claimants moved for a new trial, which, being overruled, they appealed here.

There was no question of identity or amount in this case. Each party claimed and contended for the same money, then in the hands of the court, \$57.19. It being admitted that all the money arose from the price of trees cut upon and removed from the west $\frac{1}{2}$ of southwest $\frac{1}{4}$ of section 31, township 22, range 4, the contention was reduced to the question of who owned that land.

Appellee contends that his claim is based on contract, and appellants claim on claim for cutting trees, or the value thereof. Appellee's contract provided only that Dockery should cut trees from this land, and pay \$2 per thousand for the lumber he got out of them. There was no sum fixed, and Dockery was not bound to cut any number of trees, but to pay for what he should cut, and the money became due as he cut each tree; and appellees, plaintiffs below, made out an account against him for so many thousand feet of lumber, credited him with cash, and sued on that account for balance. In point of fact, it was a suit on open account for a number of trees cut from this land, or the lumber that was in them. The claimants had the right to waive the tort and sue in assumpsit, and his claim of the money amounts to that. So that it seems that these parties are in the same condition as if each had a separate suit against the same man for the same amount of money, arising from a claim for lumber produced from trees cut from the same land, each having filed his account, and the original defendant, Dockery, had the right, as we think, to rid himself of the vexation and harassment of two suits by paying the money into court, having conformed to the provisions of § 714, code of 1892.

The contention that interpleader will not lie in the case at bar because claimants claim by paramount title, and not by any privity with the debtor, cannot obtain, as we think. If the

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subject of contention were a horse or a piano or a watch, the title would be involved; the question would be who owned the property. If the trees on the land in question had been felled and removed from the land and piled up, or converted into lumber, each party claiming possession of it, the defendant could have interpleader. And when it is converted into money, and the money in sight, and each party claiming it, he ought to be allowed to escape vexation and expense of two suits or three suits. The sole question remaining to settle the controversy was for the court to ascertain which party owned the land that produced the money, which was competent for it to do. That the trial may involve an investigation and determination of whether or not the plaintiff is owner of the land does not affect his right to sue. *Miller v. Wesson*, 58 Miss., 831.

We are of opinion that the court below erred in refusing defendants the right to prove the title of the land in question in themselves, and that plaintiffs had no title to said land, and therefore the motion for a new trial ought to have been sustained.

The judgment of the court below is reversed, a new trial granted, and the cause remanded.

TOM KING v. STATE OF MISSISSIPPI.1. CRIMINAL LAW. *Evidence. Res gestæ.*

The declarations of a defendant, made some hours after the homicide for which he is on trial, are not admissible as a part of the *res gestæ*.

2. SAME. *Examination of witness. Practice. Discretion.*

Witnesses in rebuttal should be confined to matters in rebuttal, and not allowed to repeat their evidence in chief; but this matter is largely in the discretion of the court.

3. SAME. *Murder. Sudden encounter. Instruction.*

Murder may be committed in a sudden encounter, and if previous recent threats to kill deceased or do him great bodily harm are

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proved to have been made by defendant, an instruction, asked by defendant, which directs the jury to disregard the evidence of such threats, and which ignores the idea that the purpose to kill may have been pursuant to the malice indicated by the threats, is properly refused.

4. SAME. *Onus probandi. Reasonable doubt.*

It is not the law of homicide that if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder unless he has by his evidence proved excuse or justification; nothing more in such case is required of a defendant than to raise a reasonable doubt of his guilt from the whole evidence.

FROM the circuit court of Tate county.

HON. Z. M. STEPHENS, Judge.

Tom King, the appellant, was indicted for the murder of one Walter Clayton. The evidence showed, or tended to show, that defendant laid in wait for the deceased in the early part of the night of the killing, and made threats of doing great bodily harm to deceased if he had to wait on the roadside, along which deceased was expected to come, until midnight. When the deceased came he was in the company of others, and defendant accompanied them along the road, the parties indulging in a spirited quarrel as they went. It appeared, however, for a while before the homicide, that the controversy had ended, but it was again suddenly renewed, and defendant struck deceased with a piece of a fence rail and killed him. Some hours after the homicide and during the same night, the defendant and a witness returned to the scene of the killing in search of a knife with which defendant claimed the deceased was endeavoring to cut him at the time of the encounter, and, while making the search in the dark, defendant, who was stooping and feeling about, arose, saying, "Here is the knife," and produced a "long-handled barlow," which he asserted he had found on the ground.

The sixth instruction given for the state was in these words: "6. If you believe from the evidence, beyond a reasonable doubt, that defendant made threats the night of the killing and before the killing, that he would get the deceased that night,

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and that he would make it right with him if he had to wait till midnight, and that he was afterwards seen on the road traveled by deceased; that when deceased came along defendant provoked a difficulty and procured a dangerous weapon, a piece of rail, and attempted to strike deceased when deceased was doing nothing to defendant, and was prevented from doing so, but that he, defendant, still retained the weapon in his hands and followed deceased up, then deceased would have had a right to draw a knife in his own defense; and if defendant then struck deceased and killed him, he is guilty of murder, and you should so find."

The nineteenth instruction asked by appellant, and which was refused, was as follows:

"19. If the jury believe, from the evidence, that defendant waited by the road for deceased, and stated, in effect, that he was waiting for deceased, to raise a difficulty with him, the jury will reject and discard this testimony altogether, in arriving at their verdict, if, considering all the evidence in the case, they have a reasonable doubt as to whether defendant was waiting for deceased for the purpose of killing him, or simply for the purpose of having a fight with him without weapons. This testimony will also be discarded by the jury in arriving at their verdict, if, from all the testimony in the case, they have a reasonable doubt whether the killing was the result of a sudden encounter, or was the accomplishment of a purpose in the mind of defendant while he was waiting by the road."

The other instructions referred to by the supreme court are sufficiently given in the opinion.

Eugene Johnson and J. F. Dean, for appellant.

The statement of the defendant, "while feeling around on the ground" in the dark, "Here is the knife," or "I've found the knife," at the very time he finds it, or at the very time he raises up with it in his hand, is competent testimony, and should have been admitted. The statement is a part of the

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res gestæ. It is a verbal act. It is a declaration accompanying the act, that explains it and gives it character. That this testimony should have been admitted, we contend is clearly sustained by overwhelming weight of authority. Greenl. on Ev., vol. 1, sec. 108, note 2; *Mayes v. State*, 64 Miss., 329. Whether the deceased was armed with a knife is one of the vital questions in this case. Defendant testified to this fact, and put on the stand another witness to corroborate his own statement. The ruling of the court deprived him of the full force of the testimony of this witness. The weight to be given this testimony was for the jury, not the court. The court had no more right to assume that the exclamation or statement made at the time of picking up the knife was pretended or feigned, than to conclude that defendant's whole statement about it was fabricated. The re-examination by a party of his witness should be confined to explaining and setting himself right on points which the cross-examination has brought out, but not fully developed, and which need explanation, so that the testimony of the witness may be fairly and clearly understood.

In this case the state had an advantage to which it is not entitled, it had its important testimony repeated to the jury at the very end of the case. *Dillard v. The State*, 58 Miss., 368.

The sixth charge for the state is erroneous, because it wholly omits the necessary qualification that the threats, to be of any value as testimony in the connection given, must have expressed a purpose on the part of defendant to kill the deceased, or to do him some great bodily harm, and that this was defendant's purpose or design at the time he uttered them.

The fifth instruction for the state is certainly erroneous. After the numerous decisions of this court (*Cunningham v. State*, *Polluck v. State*, *Hawthorne v. State*, and others), it is useless to discuss before any intelligent tribunal in Mississippi the doctrine of the burden of proof in criminal cases. However, the very language of the charge in question has been

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passed on and condemned. *Hawthorne v. The State*, 58 Miss., 778.

Wiley N. Nash, attorney-general, for appellee.

The facts show that appellant was seen lying in wait for the deceased on the road he knew deceased would have to travel to get to his home, and he stated that he was there to "get" Clayton, and would do so if he had to stay there until midnight. King was the aggressor throughout, from first to last, from the meeting until the death. More than this, he brought on the difficulty; he provoked it, while the deceased all the while was trying to avoid a difficulty. The appellant, when the fatal blow was given, did not act fairly, but took advantage of the deceased. He evidently slipped up on Clayton and killed him when deceased was not expecting an attack. In fact, it was thought that the trouble was over. The murdered man never spoke after he was struck. The party killed was not armed, and was entirely defenseless. The witness, Garrett, should not have been allowed to state what King said when he found a knife on the ground at the scene of the murder. It was after the transaction was over, and King was seeking an opportunity to make testimony for himself, which is not warranted by any rule of law or common sense.

The rebuttal testimony was eminently proper, and especially in the case at bar, and in the peculiar attitude of this case. Allowing witnesses to go over the same ground is a matter within the discretion of the court.

The settled rule of this court is that all of the instructions given by the court to the jury are to be construed together, and if, taken together, they correctly announce the law, a reversal of the judgment will not occur, although some of the instructions, in themselves, may not be strictly correct. *Mask v. State*, 36 Miss., 77.

When all the charges in this case are considered together, it is impossible for the jury to have been misled as to the law of this case.

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CALHOON, Sp. J., delivered the opinion of the court.

There was no error in refusing to permit the witness, Ransom Garrett, to testify to what defendant, King, said when those two were searching for a knife at the place of the killing. We agree with counsel that it was "part of the *res gestæ*," but it was part of the *res gestæ* of the search for a knife, and not of the homicide, which had occurred some hours before.

It was not in accordance with proper practice to allow the state, in rebuttal, to extract from the witness, Raiford, a rehearsal of part of his testimony in chief, but it is not reversible error in this case, because it is clear it could not have worked any prejudice to the accused. The rule is familiar that witnesses in rebuttal should be confined to matters in rebuttal, and not allowed to repeat what they said on the examination in chief, and the rule is wise and proper and promotive of fair trials. *Dillard v. State*, 58 Miss., 389, 390. However, this matter is largely in the discretion of the court, and there was no such abuse of it on the trial of this case as could have worked injury or such as warrants serious criticism. The practice encouraged might become an engine of great oppression, and should be repressed by the courts, which are not organized to convict prisoners, but to see that trials are absolutely impartial and fair.

Defendant's nineteenth instruction was properly refused. Besides being put in a shape strongly calculated to mislead a jury, it is not sound in substance. It tells the jury to discard all the evidence of threats and lying in wait, "if, from all the testimony in the case, they have a reasonable doubt whether the killing was the result of a sudden encounter, or was the accomplishment of a purpose in the mind of defendant while he was waiting by the road." Murder may be committed in a sudden encounter, and in the case before us, while the killing may not have been in the accomplishment of any predetermined purpose to kill while lying in wait, it may still not have occurred but for the hostile feelings indicated by the threats, though the

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purpose to kill may have been formed at the sudden encounter and after the lying in wait. The charge should have included the idea that, if the jury should reasonably doubt whether the killing was pursuant to any malice which might be indicated by the threats or lying in wait, whensoever the purpose to kill arose, if it ever did arise then, etc.

It was error to give the fifth and sixth charges at the instance of the state. It is not the law, as charged in the fifth instruction, that if no excuse or justification of the killing is shown in the evidence adduced by the state, the defendant is guilty of murder, "unless he has, by his evidence, proved excuse or justification." This assumes as proved that the state has established the truth of the allegations of the indictment, and made out its case, and, after this assumption, it requires the defendant to prove his innocence in order to escape the highest penalty of the law. The very thing being investigated was the truth of the charge in the indictment, and, if that was made out beyond a reasonable doubt, *prima facie* it then devolved on defendant, not to prove innocence, but simply to raise a reasonable doubt from the whole evidence in the case. The mortal danger of a charge like this is shown in the use made of it by the vigorous and able district attorney in his concluding argument to the jury, as set out in the record. *Harthorne's case*, 58 Miss., 778; *Smith's case*, *Ib.*, 874; *Ingram's case*, 62 Miss., 142. This fifth charge for the state in the case at bar is in full, thus: "While it is incumbent on the state to prove the allegations in the indictment, or to make out its case, still, if there be no excuse or justification for the homicide, by the defendant shown in the evidence adduced by the state, then he is guilty of murder, unless he has, by his evidence, proved excuse or justification.

It will be seen at a glance that, though it recognizes that the state must make out her case, it does not intimate that the jury must believe she has done so, but says defendant is guilty unless the state's evidence shows excuse or justification, or unless defendant proves it. First, the state must make out her case

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to a moral certainty. Then, and not until then, is the accused required by the law of the land to do anything, and then he need only, from the whole body of the evidence adduced for him and against him, raise a reasonable doubt of his guilt to entitle him to acquittal.

It was error to give the sixth charge asked by the state. Because defendant made threats, and because he was "afterwards seen on the road traveled by deceased," and because, when deceased came by, he provoked a difficulty, and then picked up a piece of fence rail, which was a "dangerous weapon," and tried to strike deceased, when deceased was doing nothing, but was, at that time, prevented by others, and because defendant still retained the weapon, and followed deceased—whether all this might or might not give deceased the right to draw his knife, it does not follow that, if defendant then struck and killed him, he is therefore guilty of murder, unless he got the weapon for the purpose of using it to kill or do great bodily harm to his antagonist in a difficulty he intended to provoke, and did so use it and kill with it, pursuant to that design. *Thomas' case*, 61 Miss., 60; *Hunt's case*, 72 Miss., 413.

The whole scope of this charge, by the elaborate recital of evidence for the state, is to refer the killing back to the procurement of the weapon, but it omits the purpose for which it was procured and its use in pursuance of the purpose. The error in these charges is not cured by those given for the defendant. Because of them, the case is

Reversed and remanded for a new trial.

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ALLIANCE TRUST CO. v. NETTLETON HARDWOOD CO.

1. NOTICE. *Record of deed. Purchaser of timber.*

A person who buys standing timber, even if the seller be in possession, is bound to take notice of a deed from the seller then recorded, conveying the land to another without reservation of the timber.

2. SAME. *Lis pendens.*

The pendency of a suit concerning lands is notice to the purchaser of the timber thereon, from a party to the suit, of the rights of complainant; and such notice, before the code of 1892 became operative, was effected by the mere pendency of the suit.

3. DISSEIZER. *Re-entry. Right to sue. Stranger.*

The true owner of land, who has been dispossessed, may, after re-entry, maintain trover or trespass *de bonis asportatis*, for trees cut from his land while he was out of possession, and he may so sue the disseizor, his vendees, or strangers.

4. PLEADING. *Hilary rules. Not guilty.*

Hilary rules of pleading are not in force in this state, and a plea of not guilty in trespass does not admit possession; and it does not, in trespass *de bonis asportatis* or trover, admit plaintiff's title.

FROM the circuit court of Lee county.

HON. NEWNAN CAYCE, Judge.

In 1890, S. H. Taylor and wife executed a deed of trust on lands to secure a debt, which was foreclosed in 1891, and the land was purchased by appellant. The land, however, was sold under an execution, after the making but before the foreclosure of the deed in trust, and was purchased thereunder by E. B. K. Taylor. This execution sale was vacated by a suit in equity, instituted in 1892 by appellant against E. B. K. Taylor and others, and the decree setting it aside was affirmed by the supreme court. *Taylor et al. v. Alliance Trust Co.*, 71

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Miss., 694. Pending said suit, the trees were cut for which the present action was instituted.

Plaintiff's evidence showed, or tended to show, that defendant went on to the land and cut the trees pending the equity suit, and after plaintiff's deed and the deed of trust were recorded. Defendant did not deny getting the trees, but claimed to have purchased them from E. B. K. Taylor, who was at the time in possession of the land, and denied actual notice of the deeds and of the equity suit. It is not necessary to an understanding of the legal questions decided, that the instructions, referred to by numbers in the opinion, should be given. The plaintiff had regained possession of the land when this suit was begun.

William D. Anderson, for appellant.

The court should have instructed the jury to find for the plaintiff, for, admitting everything to be true which the defendant's testimony tended to establish, and still the plaintiff's case was made out. There is no conflict in the testimony as to these facts: That, when the logs in question were cut off of the plaintiff's land, the plaintiff was the true owner of the land; that the defendant knew the logs were cut off of the land; that the defendant got the logs and used them; that the plaintiff had regained possession of the land at the time this suit was brought. Now, on this state of facts, what was there for the jury to pass on in the case except the value of the logs taken? The question of good faith on the part of the defendant, or Taylor, or anyone else, in reference to the ownership of the land and the logs, had nothing whatever to do with the matter. The question was, who really did own them? The purchaser had to look to the title of the seller and see that he was getting a good title.

Gilleylen & Leftwich, on same side.

The first count in this declaration is technically trespass, the second is for debt, waiving tort, the third for trover and con-

Brief for appellee.

version. Now, the question of the possession of the land can only arise under the first count. There was no demurrer. The only pleas which are to all the counts in the declaration are not guilty and *nil debet*; the first plea alone applying to the first count. Under these pleas the possession of the *locus in quo* at the time of the trespass by the plaintiff cannot be denied by the evidence on the trial, for these pleas admit the possession of the plaintiff. Chitty on Pleading, p. 520 (10 American Edition); *Ostram v. Potter*, 62 N. W. Rep., 170. When the disseizee regains possession, he can maintain his action for damages suffered between the disseizen and re-entry. *Emrich v. Ireland*, 55 Miss., 390.✓ As to the count for trover and conversion, possession of the realty was not necessary; plaintiff only had to have the right of possession—the conversion is the gist of the action. 4 Minor's Insts., 487–489; *Ib.*, 389–491. If the land was plaintiff's when the trees were cut (and that has been fully adjudicated, 71 Miss., 694), the trees still belong to the owner of the land after they are cut. *Harris v. Newman*, 5 Howard, 654. Trover may be brought for the value of a house which was a fixture, removed from the land of another. *Stillman v. Hamer*, 7 Howard, 421. Trees are fixtures or part of the realty before they are severed. *Harrell v. Miller*, 6 George, 700. The defendant cannot claim want of notice, if notice was necessary, for the deed of appellant was of record. Taylor's deed was also on record, but it was a sheriff's deed, under a satisfied judgment, and was therefore void as defendant is charged with knowing. *Taylor v. Alliance Trust Co.*, 71 Miss., 694. Defendant had constructive notice. Notice by *lis pendens* defendant had also, for suit had been brought by appellant for the land when appellee got the trees. *Chaffe v. Patterson*, 61 Miss., 28; *Allen v. Poole*, 54 Miss., 323.

W. R. Harper, for the appellee.

It is first contended by counsel for appellant that the pleas

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did not put at issue its possession at the time of the wrong. Chitty, 520, is cited to sustain this position. But counsel failed to observe that Chitty is then writing of the state of the law in England "since the recent rules," referring to certain rules of court adopted at Westminster. It is clear that defendant never entered the close or authorized anybody to go on the close and cut timber. It only bought timber cut on the close when delivered to it miles away.

If appellant recovers, it must be, then, only for value of the trees converted by it upon the counts of trespass *de bonis asportatis* and trover. But we say that these two forms of action cannot be maintained against defendant on the facts of the case here presented. We admit the doctrine laid out in *Emrich v. Ireland*, 55 Miss., 370, that he may maintain an action of *quare clausum fregit* against the disseizor for damages to the close intermediate the disseizin and re-entry, because, by a legal fiction, his possession is made to relate back for that particular purpose, but for no other. *Brothers v. Hurdle*, Ired., 490.

WHITFIELD, J., delivered the opinion of the court.

That the appellant is the real owner of the land from which the trees were cut, whose actual value is sought, in this suit, to be recovered, and had title, was settled in *Taylor v. Trust Co.*, 71 Miss., 694 (15 South., 121). The declaration in this case contains three counts—trespass *quare clausum fregit*, trespass *de bonis asportatis*, and trover. The plea of not guilty was interposed to all these counts, as was also the plea *nil debet*. It is not disputed that the appellee got the timber from Taylor, who had no title, and has converted it to its own use. The trees were cut by employes of the appellee, acting, as appellee claimed, as Taylor's agents. It is shown, also, that, when cut, the deed of appellant was of record, and the former chancery suit in which appellant's title was established, begun before the code of 1892 went into effect, was pending, and that the appellee was not in possession of the land. It is manifest from the

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record that the case was made to turn in the court below on the fact that appellee bought from Taylor, as is alleged, in good faith, without actual notice of appellant's title; and although appellant's deed was duly recorded, and its bill pending—governed, as to the *lis pendens* notice, by the law prior to the code of 1892—the court modified instructions 3, 4, and 5, asked by plaintiff so as to hinge plaintiff's right to recover on the want of such actual notice. These modifications were all erroneous. No notice was necessary, and, if any had been, the appellee was charged with knowledge of the true state of the title by the record of the deed of appellant, and was bound also by the *lis pendens* notice. *Evans v. Miller*, 58 Miss., 120; *Allen v. Poole*, 54 Miss., 323. The charges should have been given as asked, as should also charges 6, 7, 8 and 9. As to the ninth, plaintiff only asked for the value of the trees standing in the woods, which, as shown by the evidence, was several hundred dollars less than their value at the mill. If appellant was willing to take less than it was entitled to (as to which see *Skinner v. Pinney*, 45 Am. Rep., 1), appellee would be benefited, not harmed, thereby. And the charge No. 1, given for appellee, was erroneous for reasons above stated

But it is insisted with great ingenuity and earnestness that neither trespass *de bonis asportatis* nor trover will lie to recover of a purchaser from a disseizor, or from the disseizor himself, the value of trees cut from the land of the true owner, during possession by such disseizor. It is said that the doctrine of *Emrich v. Ireland*, 55 Miss., 390, goes to the extent of holding only that trespass *quare clausum fregit* may be brought against the disseizor to recover damages to the close intermediate the disseizin and re-entry by the true owner, after re-entry; that case being a suit to recover the damages to the freehold occasioned by the removal of a log house and fence. The reason assigned for the distinction is, that the possession of the true owner, by a legal fiction, relates back for this particular purpose of bringing *quare clausum fregit* for such damages to

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the freehold, and for that purpose only, and that it does not so relate back to enable the true owner, after re-entry, to recover the value of trees severed from the freehold intermediate the disseizin and the re-entry, from a disseizor who has so cut them while in possession, or any purchaser from him, or any second disseizor; and *Brothers v. Hurdle*, 10 Ired., 490, s.c. 51 Am. Dec., 400, is cited in support of, and does squarely maintain, the contention.

But the precisely opposite doctrine is announced in an opinion of great force by Savage, C. J., in *Morgan v. Varick*, 8 Wend., 587, in the course of which it is said with great power: "If that be law, any irresponsible person may turn the owner forcibly out of possession of his real estate, sell the buildings and the timber, and thereby destroy the value of the property; he may sell it, too, under ever so suspicious circumstances, . . . and according to the doctrine quoted [the identical doctrine of *Brothers v. Hurdle*], the purchaser is safe, and the owner has no remedy." And the law, as thus announced, is also emphatically approved in *Truber v. Miller*, 48 Conn., 347, and *Green v. Biddle*, 8 Wheat., 75, and by Mr. Freeman in a note of great clearness and learning to *Anderson v. Hapler*, 85 Am. Dec., 318, where he distinctly shows that the possession relates back to enable the owner, after re-entry, to bring trespass *de bonis* or trover for timber, etc., cut and carried away by the disseizor, while in possession, against such disseizor, and then, after adverting to the authorities holding that such suit could not be brought against strangers or anyone other than the disseizor, he says: "On the other hand, there is weighty authority to the contrary, and to the effect that after re-entry the disseizee may have his action of trespass, either against the disseizor, his lessee, donee, or feoffee, or against a stranger, for mesne profits and trespass done during the disseizin, on the ground, of course, that by relation the possession is regarded as having been continuously in the plaintiff since the disseizin," citing, with approval, *Morgan v. Varick*, *supra*

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(so unsatisfactory to Pearson, J., in *Brothers v. Hurdle*), and many others. And Mr. Freeman then adds that "strangers against whom the doctrine of relation is not effectual, should be strangers who enter under a title upon which they are justified in relying. The doctrine of relation regards the disseizee as having been in possession during the whole period of disseizin, and, therefore, after re-entry, the law cannot regard the disseizor as having been in possession at all, since one or the other must have the possession. Therefore, after ouster, the disseizor has no action against the trespasser during his possession, and consequently the true owner will have the remedy, there being no wrong without a remedy, but against the trespasser only. It is worthy of special observation that in this case of *Brothers v. Hurdle* it is held that such trees severed, as described above, become chattels, but do not become the property of the owner of the land, because it is said "he is out of possession, and has no right to the immediate possession of the thing," etc. It is true that the property whose value was there sued for in trover, was some fodder raised by the disseizor while in possession, and stacked, but the court properly repudiated any distinction, as to the proposition under consideration, between severed fodder and severed tress—*fructus industriales* and *fructus naturales*.

But the very opposite of this doctrine is held in *Harris v. Newman*, 5 How. (Miss.), 654–658, and in *Evans v. Miller*, 58 Miss., 120. In the first named case, *Harris v. Newman*, Sharkey, C. J., declared that if Harris, the defendant in trover, had really had title and right of possession, trover could not have been maintained, "because, being owner of the timber before it was cut into wood, he would own the wood also," and (page 658) that, "when trees are severed from the soil, . . . the right of the owner of the trees is not divested," etc. It was an action of trover by Newman, the true owner, for the value of cord wood cut by Harris, the disseizor, while in possession, Newman having re-entered.

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It is further to be noted that *Brothers v. Hurdle* is a North Carolina case, and that it is shown by Mr. Proffatt, in the note to *Hostler's Admr. v. Skull*, 1 Am. Dec., 585, that the "courts of North Carolina have gone further than any of our courts in requiring both title and possession to maintain trover;" and that *Brothers v. Hurdle*, though adhered to in *Branch v. Morrison*, 5 Jones (N. C.), 17, was criticised therein by counsel. The reasoning in the case is wholly unsatisfactory to us. But the view we take is supported, also, by Liford's case, found in 6 Coke, 46b (not 11 Coke, 51, as erroneously cited in *Emrich v. Ireland*, *supra*), which we have carefully examined. The singular thing about this case is that it was misconceived both in *Brothers v. Hurdle* and *Morgan v. Varick*, *supra*. In the former, Pearson, J., said that Lord Coke suggested a distinction between such things as corn, etc., which come by the act of the party, and such things as trees, which come by the act of God. Lord Coke simply said that distinction was suggested by certain year books, but himself repudiated the distinction.

So, in *Morgan v. Varick*, Savage, C. J., wrestles with Liford's case as contrary to his view, when it directly supports him. What he quotes is merely Coke's statement of what the year books have held. What Coke himself says on page 51b is as follows: "But, upon consideration of all the books, it has been resolved and adjudged that it is all one [as to *fructus industriales* and *naturales*], and there is no diversity betwixt them; for the rule and reason of the law is, as has been said, that, after the regress of the disseizee, the law adjudges, as to the disseizor himself, that the freehold has continued in the disseizee, which rule and reason doth extend as well to corn as to trees or grass, etc.; the same law if the feoffee or lessee or the second disseizor sows the land, or cuts down trees or grass, and severs or carries away or sells them to another; yet, after the regress of the disseizee, he may take as well the corn as

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the trees and grass, to what place soever they are carried, for the regress of the disseizee has relation as to the property to continue the freehold, against them all, in the disseizee *ab initio*, for the taking them out of the land cannot alter the property, and, if the disseizee takes them, they shall be recouped in damages against the disseizor," which case is, therefore, in perfect harmony with our decisions, *Harris v. Newman* and *Evans v. Miller*, and the other authorities collated by Mr. Freeman in note *supra*. Trover or trespass *de bonis asportatis* can be maintained by the disseizee, the true owner, after his re-entry, for the value of trees cut by the first or second disseizor or their grantees intermediate the disseizin and such re-entry.

As to trover—and one of these counts is in trover—it is expressly so held in *Heath v. Ross*, 12 Johns., 140 (85 Am. Dec., 325, note). See, particularly, the whole of this masterly note, to which we make special reference. And see, also, 26 Am. & Eng. Enc. L., 774–8. *Miller v. Wesson*, 58 Miss., 831, does not militate against this doctrine. The cases cited there (*Mather v. Trinity Church*, 3 Serg. & R., 509, and others) merely hold that the true owner, while out of possession, cannot maintain trover for the value of things severed from the freehold, and converted, as against one in actual adverse possession, claiming title, on the ground that it would necessitate a trial of the title to the land in an action of trover, which would be greatly inconvenient. We say nothing as to this last point, though this very case, *Miller v. Wesson*, held that such title was triable in an action of debt to recover the statutory penalty for cutting trees. But the general proposition that the disseizee, while disseized, cannot maintain trover, against one in actual adverse possession for trees cut by him while in possession (see 85 Am. Dec., 322, note), provided the possession is "adverse, so as to amount to a disseizin," affords appellee no comfort; for it was not in adverse possession, but simply bought the trees, as counsel well says, "miles away, at its mill."

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But it is next contended that the general issue (not guilty) put in issue the possession on these counts. It is conceded that, under the rules as to pleading in force in England (Hil. T., 4 Will. IV., Steph. Pl., Append., note 44, rule 5), the general issue (not guilty) is narrowed in its scope so that in trespass *quare clausum fregit* it admits the possession and the right of possession, and in trespass *de bonis asportatis* it admits the plaintiff's property in the goods, and in both puts in issue only the commission of the trespasses, as stated by Steph. Pl., secs. 159, 160. But it is said that these rules are not in force in this country (*Id.*, p. 162, note 20), nor in this state. It is said in the case of *Tittle v. Bonner*, 53 Miss., 585: "Our statutes [on pleading] intended to correct the evil which resulted from the general form of pleading before prevalent, and to require every affirmative matter to be pleaded specially or given notice of, so as distinctly to inform the opposite party of the precise ground of contest on which he is to be met by his adversary. . . . The framers of our present law of pleading, as regulated by statute, had in view the valuable improvements introduced by the courts of England by the Reg. Gen., Hil. T., 4 Will. IV., and the statutes on the subject should be so applied as to effectuate the object in view." This was said, however, with reference to affirmative matter, which should be pleaded specially, or notice given of it under the general issue. Under the Hilary rules (rule 1, in Steph. Pl., Append., note 44), *non assumpsit* is not admissible at all in an action upon a bill of exchange; but *Tittle v. Bonner* was such an action, and the plea of *non assumpsit* was not condemned.

The effect of not guilty in trover, under the Hilary rules, is clearly pointed out in 26 Am. & Eng. Enc. L., 809, 810, where it is said: "The general issue in trover is not guilty. There is some conflict of authority as to the right of the defendant to show, under such plea, that the plaintiff had no such interest in the property as would authorize him to sue in trover. It is generally held in the United States that he can, and this

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was formerly the rule in England; but, since the adoption of the pleading rules of Hilary term, the general issue of not guilty is there held to operate only as a denial of the conversion, and not of the plaintiff's title to the goods, and this is the rule adopted in some states. Under these rules, if the defendant wishes to put in issue the plaintiff's right to the possession of the goods, he should traverse that he was possessed of them as of his own property in manner and form as alleged in the declaration," citing, in note 2, many authorities, and, in note 1, page 811, cases from Massachusetts, New York, and Florida. But *Alexander v. Eastland*, 37 Miss., 558, holds expressly that not guilty in trespass does not admit the possession. It is not very clear from the report whether this case arose before or after the code of 1857, wherein was first set forth the statute law of pleading declared in *Tittle v. Bonner* to have been adopted in view of the valuable improvements made by the Hilary rules. Logically, of course, if these rules are meant to be enforced here, not guilty in trespass *quare clausum* admits plaintiff's possession and right of possession, and in trespass *de bonis* his property in the goods, and in trover that he has such interest in the property as entitles him to maintain trover; and there may be much to commend this practice. But these rules have never been adopted by statute here. An inspection of them (Steph. Pl., Append., note 44) will show that they are not in force here as to the effect of the general issue in several forms of action; and while, as to affirmative matters, as held in *Tittle v. Bonner*, *supra*, they must be specially pleaded, or notice of them given under the general issue, we do not think the Hilary rules are themselves in force with us. Not guilty with us, as at common law, does not admit in trespass the possession, or in trespass *de bonis* or trover the property in plaintiff. But it is settled with us that all that is necessary to maintain trover is the right to immediate possession. *Dejarnett v. Haynes*, 1 Cush., 600; *Harris v. Newman*, *supra*; *Ware v. Colins*, 35 Miss., 230, 231. Indeed, under our statute (§ 671,

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code 1892) abolishing forms of action—a most wholesome statute—as construed in *Evans v. Miller*, 58 Miss., 120, the form of action seems clearly immaterial. What we have said sufficiently indicates the course the case should take on the new trial.

Reversed and remanded.

M. A. BLACKWELL v. W. D. GRAHAM.

EVIDENCE. *Erroneous admission. Reversal.*

If a plaintiff so far fails to make out his case that a peremptory instruction could rightfully be given against him, he cannot reverse the judgment for defendant because the trial court permitted defendant to introduce incompetent evidence.

FROM the circuit court of Pearl-River county.

HON. S. H. TERRAL, Judge.

The facts are stated in the opinion.

Watkins & Travis, for appellant.

G. W. Ellis, for the appellee.

STOCKDALE, J., delivered the opinion of the court.

This was an ejectment suit by appellant (plaintiff below), for the possession of a strip of land, ten feet wide and two hundred and ten feet long, on the south side of lot No. 2, block No. 2, in the village of McNeil, in Pearl-River county.

There are five assignments of error. The second and third go to the action of the court below in admitting the testimony of the witnesses, Graham and Harvey. These gentlemen were competent witnesses; but the assignments are intended to apply to certain parts of the testimony of each, as is shown by the record and the argument of counsel. Both of these witnesses testified, over the objection of plaintiff, that there was a mis-

Opinion of the court.

take in the plat of the town of McNeil, which plat defendant referred to in his deed to plaintiff of lot 2. Plaintiff's counsel protested, and insists in his argument here that defendant could not change his plat by which he sold to plaintiff lot 2, nor be heard to contradict the recitals of his deed nor the plat, so far as he recites them, nor to reform the deed, by parol, in a court of law in an ejectment suit, to the injury of his vendee—evidently a correct proposition—and any such testimony ought not to enter into the determination of this case, and probably did not in the court below. Whatever of the testimony of said witnesses as is not subject to these objections may be considered.

The deed from Graham to Blackwell describes lot No. 2, block No. 2, which block No. 2 is bounded by Clark, Common and Avenue streets, said lot fronting on Clark street 210 feet, and running back between parallel lines 210 feet to Common street, and described in Harvey's map, etc., which map is in evidence. There is no discrepancy between them, and it is clear that appellant is entitled to lot No. 2, as described in the deed.

W. D. Graham, the defendant, testified that he and appellant together measured off the land that he had agreed to sell Mr. Blackwell, appellant, and they drove stakes at the corners; that was some time before the deed or plat was made, and Blackwell paid him for the lot; that when he employed Harvey to lay off the town and make the plat, he instructed him to so divide block No. 2 as to make the lines of lot No. 2 conform to the stakes put down by himself and Blackwell, indicating the lands sold or bargained to Blackwell. Harvey testifies that he did so lay off lot No. 2 as to conform to the lines made by appellee and appellant. There was no rebuttal of any of this testimony.

Plaintiff (appellant) himself testifies as follows: "If the strip of land in controversy is a part of and lies within the boundaries of lot No. 1, then I do not claim it; but I do not think the land in controversy lies in lot No. 1. If lot No. 2

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has 210 feet fronting on Clark street, outside of the strip of ten feet which I am suing Mr. Graham for, then that is all the land that I am entitled to; but I claim that it takes the strip of 10 by 210 feet to make my 210 feet, measuring north and south on Clark street. Yes, if from the southern boundary of lot No. 3, measuring southward on Clark street up to the northern boundary of the strip of land in controversy, there should be found by survey to be 210 feet, then I would have no claim on the land I am suing Mr. Graham for."

P. J. Harvey, the surveyor, was introduced for defendant, and followed Mr. Blackwell and testified as follows, in part: That he laid off lot No. 2 to coincide with the lines marked by the stakes put down by Mr. Graham and Mr. Blackwell, and then goes on: "Well, I then surveyed lot No. 2, in said block, and found the stakes, etc. . . . I further found that from the stakes marking the southern boundary of lot No. 2, measuring north on Clark street up to the southern boundary line of lot No. 3, in said block No. 2, it just measured 210 feet."

These two witnesses describe the same line, and therefore plaintiff has no claim on the strip in controversy, but has the amount he purchased and for which his deed calls—210 feet on Clark street by 210 feet running back between parallel lines. It is stated in the notes, but not shown by the map itself, where the surveyor commenced to lay off the town, nor is it stated in the deed, nor how far any point of lot No. 2 is from any point or known or fixed object, except it fronts on Clark and Common streets. The proof, however, shows that the surveyor commenced to lay off block No. 2 at a point and on lines arbitrarily fixed at the stakes where appellant and appellee had marked lot No. 2, and which was pointed out by appellee to appellant as the lands to be paid for by appellant; and appellant had the right to that land and could have demanded a deed to it, and appellee would have been compelled to make it coinciding with the lines pointed out and agreed upon, regardless of whether lot 1 should be larger or lot 5 smaller.

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We think that, leaving out of view any objectionable testimony, the plaintiff below (appellant here) failed to make out his case, or such a case as would have warranted the jury to find in his favor, and that the peremptory instruction to the jury to find for defendant was properly given.

The judgment of the court below is affirmed.

CASES ARGUED AND DECIDED

—IN THE—

SUPREME COURT OF MISSISSIPPI,

—AT THE—

MARCH TERM, 1897.

PRESTON BOND ET AL. v. W. E. GRIFFIN.

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389 587

1. TRESPASS TO LAND. *Good faith. Measure of damages.*

Where defendant, in good faith, believing he owned the land, cut trees therefrom, he is liable to the real owner only for the value of the trees at the time of the taking. *Illinois, etc., R. R. Co. v. LeBlanc, post, p. 626.*

2. REPLEVIN. *Alternate judgment. Code 1892, § 3726. Election.*

If a plaintiff in replevin recover, the judgment, under code 1892, § 3726, should be in the alternative, for the property or its value as found by the jury. The defendant in such case can elect to pay the value and retain the property.

3. SAME. *Plaintiff's interest. Instruction.*

If the testimony shows that plaintiff has only a limited interest in the property, an instruction announcing his right to recover should confine the right to the value of such interest.

FROM the circuit court of Harrison county.

HON. S. H. TERRAL, Judge.

Appeal by defendant below and the sureties on his replevin bond; cross appeal by plaintiff below. The facts are stated in the opinion of the court.

Brief for appellants and cross appellees.

Mc Willie & Thompson, for the appellants and cross appellees.

The logs actually cut and removed from the school land in question were so inextricably mingled with the other logs of the defendant as to render identification of them impossible. Under the established rule, replevin cannot be maintained in such a case unless the confusion was caused by the wilful and wrongful act of the defendant. In the absence of proof of such wrongful act, complete identification is required. 20 Am. & Eng. Enc. L., 1063, notes 3 and 4.

The court will also observe that in this action the lower court, by its instructions, recognized the attitude of the defendant as one who had cut and removed the timber upon a *bona fide* claim of right, and limited the damages recoverable against him to the value of the trees as they stood in the forest. It would be idle to argue the propriety of this ruling, in view of the recent clear and emphatic utterances of this court in the case of the *Illinois, etc., R. R. Co. v. LeBlanc*, *post*, p. 626, where the authorities on the subject are fully reviewed.

The judgment in this case is incorrect, even if we concede the plaintiff's right to a recovery. The defendant had given bond, but the judgment is not expressed in the alternative, as required by § 3726, annotated code 1892, and does not give to the defendant and the sureties on his bond, the alternative right to restore the property or pay the assessed value thereof. This is a flagrant violation of the terms of the statute, as well as a shrewd method of obviating the effect of the instructions of the court for the ascertainment of plaintiff's damages.

Proceeding under this erroneously entered judgment, the plaintiff promptly notified the defendant and his sureties that he elected to require the restoration of the logs, or, in other words, would take the property as enhanced by the labor and means of the defendant, who had cut the logs, believing in good faith that he owned them and the land on which they stood. The logs were worth \$900 cut and put into the water courses. As they stood in the forest, they were worth the sum found by

Brief for appellants and cross appellees.

the jury, \$121.75. That the judgment is erroneous in not following the statute providing for a recovery in the alternative of the logs or their assessed value, there can be no doubt. Code 1892, § 3726; *Pearce v. Twitchell*, 40 Miss., 344; *Bates v. Snyder*, 59 Miss., 497; *Heard v. James*, 49 Miss., 236; *Illinois, etc., R. R. Co. v. LeBlanc*, *post*, p. 626. Suppose the case of replevin for a mere canvas worth five cents, upon which, after it had been taken in the honest belief of ownership, defendant had painted a masterpiece, the picture being worth thousands of dollars. Could the owner of the canvas recover the picture in replevin, or would the defendant have the right to retain it, paying full value for the trifling canvas?

The other questions in the case are so well argued by Mr. Evans, our associate, that we can add nothing to his brief upon them.

W. G. Evans, Jr., on the same side.

“If timber is even severed by a trespasser from leased premises, the lessor shall have it, and not the tenant for life or years.” 1 Washburn on Real Prop. (4th ed.), 154, sec. 49; Taylor’s Landlord and Tenant, 59, sec. 51 (8th ed.). “Trees, however, when severed from the freehold, become the absolute and sole property of the reversioner, and trespass will lie in his favor against anyone who removes them, even though it be the tenant himself.” 1 Washburn, 154, sec. 49; *Ib.*, 157, sec. 55; *Ib.*, 466, sec. 20; *Ib.*, 129–30, sec. 5; *Ib.*, 155, sec. 51. “The tenant cannot maintain a suit or recover timber cut from the leased premises.” 1 Taylor’s Landlord and Tenant, 415, secs. 354, 771 (8th ed.); 2 *Ib.*, 189–90, sec. 173. “If trees be severed by a trespasser, the lessor shall have them.” 1 Taylor’s Landlord and Tenant, 409–10, sec. 350 (8th ed.). The title to the lands from which the logs in controversy were cut (section 16) was at that time, always has been, and is now in the State of Mississippi. *Jones v. Madison County*, 72 Miss., 777. In a lease of a sixteenth section there is no authority given, ex-

Brief for appellees and cross appellants.

pressed or implied, authorizing a tenant to cut timber, more than the implied right to do repairs, erect buildings on the land and remove such timber as may be required in order to improve and cultivate the land, and a tenant of a sixteenth section stands, therefore, in the identical attitude of any other tenant, it matters not if his term is for ninety-nine years; and we can find no authority anywhere which authorizes a tenant to recover timber that has been cut and removed off the demised premises. The judgment cannot stand, as it is in direct conflict with the instructions of the court. When a judgment in replevin is for a limited interest, it should be so stated. Code 1892, § 3726; also see annotations in code.

Calhoon & Green, for appellees and cross appellants.

The material part of the judgment is, that plaintiff have and recover the logs, describing them, and, if the same are not to be had, the alternate value thereof, to wit: \$121.75. The point is made that this judgment is wrong, because it gave to the plaintiff, the real owner, the right to have the logs themselves restored to him. Counsel seem to think that the statute is solely for the benefit of the defendant, the wrongdoer, and that it gives him the option of returning the property or paying its value. This will not do at all; the fact is, that, even under the statutes which left out the words "if to be had," the courts have always held that the plaintiff might have the property if it could be found, otherwise he got his damages. Up to the enactment of the code of 1892, the statutes on the subject of the judgment in replevin, have provided that the judgment should be for the recovery of the property and the damages assessed, in case the sheriff held the property, and, in case the property remained in the possession of the defendant, that the judgment should be that he restore the property or pay its value. Code 1880, §§ 2622, 2623.

Pursuant to this judgment, the statutes awarding execution in action of replevin, have always been to command the sheriff

Brief for appellees and cross appellants.

to take the property in controversy, if the same may be had, and deliver the same to the successful party, and, if not to be had, that he make the value therefor, together with the damages and cost of the goods, etc., of the party and his sureties, against whom the judgment is rendered. Code 1880, § 2624.

All that the code of 1892, § 3726, does, is to incorporate in the section on judgments, the words "if the same may be had," which appear in all the statutes on executions in replevin. Code 1892, §§ 3726 and 3729. This was done simply to harmonize the sections on judgments with the sections on executions in replevin. *Harvey v. Edington*, 25 Miss., 22; *Anderson v. Tyson*, 6 Smed. & M., 244; *Heard v. James*, 49 Miss., 236; *Peterson v. Polk*, 67 Miss., 163; *Smokey v. Peters*, 66 Miss., 471; *Phillips v. Gastrell*, 61 Miss., 416, 417.

Replevin must not be confused with either trover or trespass in the consideration of this case. Trespass is for wrongdoing, and is to recover damages for the wrong, and not to recover goods or their value. Trover is of the same nature, and both proceed on the idea that the goods are not recoverable, while replevin is an action to recover a specific thing which has been taken from the owner. In an action of trover, only the value of the property lost is recoverable; in an innocent trespass, only actual damages. In an action of replevin the property has always been recoverable, but damages over and above the recovery of the property, in an action of replevin, cannot be had where the original taking was not wilful.

The further distinction is to be observed, as in the LeBlanc case, that where the party is in the actual adverse possession of property under a *bona fide* claim of right, and he removes part of it and sells it, he is liable in trespass for only the actual value of the property before its amotion. The reason is plain, because the bringing of the action of trespass might be delayed until repeated amotions had involved large expense and damages. But, suppose in the LeBlanc case, *post*, p. 626, that as soon as the gravel had commenced to be removed, LeBlanc had

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entered his action of replevin against the railroad company for the specific gravel, which could have been seized and identified by the sheriff. In such case, would any lawyer pretend that LeBlanc could not have recovered his specific gravel? We apprehend not. To so hold would, of course, invite the seizure of property by wrongdoers, and would force the owners to part with their property whether they wanted to or not. If a party can identify the original materials, he can pursue and recover them in an action of replevin, whatever alterations those materials may have undergone. *Street v. Nelson*, 80 Ala., 230; *Wright v. Guier*, 9 Ways, 177; *Riley v. Boston*, 11 Cush., 11; *Snyder v. Vaux*, 2 Rawle (Pa.), 421; *Wingate v. Smith*, 20 Me., 287; *Schluenburg v. Harriman*, 21 Wal., 44; *Bent v. Hoxie*, 90 Wis., 625.

The attempt of counsel to assimilate this case to that of a man who had tortiously come into possession of a piece of canvas and had painted on it a picture worth a vast sum of money, is hardly worthy of consideration. Such an instance is too extreme for the courts to consider in establishing rules for the conduct of mankind in the multiplied transactions of life. But this attempted parallel has been often exploded. Aside from the fact of the very insignificance of the value of the cloth, it had by the picture undergone a total transformation. The value of the cloth had been destroyed, and an entirely new thing with a new value had been created on it.

The point made by the counsel that the state only could sue, because she had the reversionary interest in the sixteenth section as lessor, we think does not deserve very serious consideration. It would be sufficient to dispose of this to say that all the doctrines in reference to kindred matters, which arose out of the feudal system, have no pertinency to the condition of things in this country. It is never considered here that a lessee for ninety-nine years of school land may not cut trees and use the property as his own. The truth is, generations must elapse before the lease expires, and the standing timber

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would rot down in many instances. Another consideration, to hold as counsel request would be an invitation to plunderers on school lands, because, if the lessee could not recover, the state would never intervene, as it has never intervened.

But a case identically similar to the one at bar, and decidedly on our side of the question, is *Reynolds v. Dexter*, 2 Wash., 185. In that case, the counsel for the trespasser made the same points and cited the same authorities as in the case at bar.

Argued orally by *T. A. McWillie*, for appellants and cross appellees.

STOCKDALE, J., delivered the opinion of the court.

This is a replevin suit brought by W. E. Griffin, appellee, against Preston Bond, appellant, for pine saw logs cut and removed by said Bond from lands that the said Griffin claimed to own—section 16, township 2, range 12. The jury rendered a verdict for plaintiff for 966 logs or their alternate value, \$121.75, and the court rendered judgment in accordance with the verdict. Both parties moved for a new trial, both motions were overruled, and both parties appealed to this court.

On the trial the plaintiff below set up a ninety-nine years lease of said section 16, township 2, range 12 by the board of supervisors of Harrison county, Mississippi, to Margaret C. Thomas, and deraigned his title from her, and proved to the satisfaction of the jury that 966 pine saw logs had been by defendant cut and removed from said land and put in Red creek and Caney creek and mingled with other logs cut from other lands, and proved the value of the logs in the trees, the court having refused to allow him to prove the value of the logs as they then were with additional value of cost of labor in cutting, hauling, branding and marking ready to float to market.

At that stage of the trial defendant moved to rule out all the evidence introduced by plaintiff, because the title to said sixteenth section was in the State of Mississippi, and that the

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lessee had no right to cut timber for sale nor to recover possession of timber cut from said land. The court overruled the motion, and defendant reserved an exception.

There is no evidence in this record as to the character of the land from which the timber was cut, whether it is adapted to and specially valuable for husbandry, or whether only valuable for timber or other purposes, and we express no opinion on this assignment.

The record shows that at the tax sale of delinquent lands by the sheriff of Harrison county, on the sixth of March, 1893, the land here in question was sold to Preston Bond, who paid the purchase money, \$10.48, and the sheriff gave him a receipt therefor showing that that was the purchase money for this sixteenth section. The sheriff, by oversight, neglected to make and file with the clerk a deed of said lands, as the law requires and as appellant, Bond, supposed had been done, until the time for redemption of said lands had expired and called on the clerk for his deed. He called on the sheriff to know the reason of his failure, and the sheriff then made him a deed, dated, however, October 23, 1895.

The defendant, Mr. Bond, was put on the stand as a witness for plaintiff, and, on cross-examination, testified to his good faith in cutting the trees.

To Mr. Bond: *Ques.* "How came you to cut timber on section 16?" *Ans.* "Because I thought it was mine." *Ques.* "How came you to think it was yours?" *Ans.* "I bought it." Mr. Ford, counsel for plaintiff: "We insist on the production of the deed." (Deed handed to plaintiff's counsel.) *Ques.* "Is that the deed, Mr. Bond?" *Ans.* "Yes, sir, that is the deed." Mr. Evans, counsel for defendant: "We offer this deed in evidence." Mr. Ford: "We object to that deed." (Deed read to jury.) Mr. Ford: "Our objection is that this deed is a tax deed, made two years and six months after the date of sale; that it is not made in accordance with the statute."

Mr. Batson testified: "After I went and counted the logs, I

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went to see Mr. Bond, and told him what was going to take place if he didn't turn the timber over. They were going to enter suit against him—the company would.” *Ques.* “What did he say? State what he said.” To these questions the witness answered at some length—to the effect that Bond said he thought the timber was his, he had the sheriff's title for it, he bought it in 1893, and thought he had a right to cut it. In fact, Mr. Evans told him it was all right, but if it did not belong to him, he would return standing timber in its place. This witness further testified that he was representing Dantzler & Co.; did not remember whether he told Bond that Griffin claimed the land.

The timber here in dispute was cut in the fall of 1895, which was after the time provided for redemption of lands sold March 6, 1893.

Defendant asked the following instruction, which was given: “The court instructs the jury that if they believe that the defendant cut the timber in good faith, and not wantonly, carelessly, or negligently, then the jury should find the value of the timber at the time of the taking, and not the value at the time the logs were seized.”

It seems from the foregoing that the question of the good faith of the defendant in cutting the timber was fairly submitted to the jury, and was decided in his favor by their verdict.

The court declined to instruct the jury to find for plaintiff the value of the logs in the creeks at the time they were levied on, but modified the instruction so as to make it read that the jury should find the value of the logs in the creek, less the cost and labor of hauling and putting them in the creek.

It was error, we think, in the court below to give the instruction asked by plaintiff to the effect that plaintiff is entitled to the possession of the logs cut from the lands embraced in plaintiff's deed from Dantzler, administrator, and so forth, without adding “or the value of the limited interest of plaintiff therein, as shown by the testimony,” or some language of equal import.

Opinion of the court.

We think the rulings of the court below were on correct principles, leaving out of view the grant of the instruction last referred to, asked by plaintiff. *Illinois, etc., R. R. Co. v. Le-Blanc*, manuscript opinion at this term. (*Post*, p. 626.)

And the judgment ought to have been rendered in terms comports with the doctrines announced by the court, commanding the defendant and his bondsmen to restore the logs to plaintiff, or pay him the value of his limited interest therein, as found by the jury, to wit: \$121.75. And that upon the payment of that sum by defendant, he may retain the logs, and the judgment thereby be satisfied.

The judgment of the court below is reversed, and judgment rendered here in accordance with this opinion. There are two separate and independent appeals from the same judgment, but the judgment here ordered to be entered will settle all the questions involved, and it will not be necessary to discuss further the other points made by either appeal. Both appellants use the same record, and the costs of the two appeals will be taxed half on appellee, W. E. Griffin, and half upon appellant, Preston Bond, and the cost of the court below must be paid by the defendant in that court, Preston Bond.

Syllabus.

COMMERCIAL BANK v. WILLIAM C. AUZE ET AL.

1. CONTRACTS. *Conflict of laws. Lex loci contractus. Lex solutionis.*

The law for the construction and enforcement of contracts made in one state to be performed in another, is accurately and clearly stated in the case of *Brown Brothers v. Freelund & Murdock*, 34 Miss., 181, and the syllabus to that case is commended.

2. USURY. *Code of 1880, § 1141. Code of 1892, § 2348.*

Under the code of 1880, § 1141, if a lender stipulated for interest in excess of ten per centum, the contract was usurious and all interest was forfeited. The code of 1892, § 2348, did not substantially change the law, by the provision that all interest shall be forfeited if the lender stipulates for or receives interest in excess of such rate; and so far as concerns the right of the lender to sue for and recover usurious interest paid, where the same was stipulated for in this state, the codes are substantially the same.

3. SAME. *Penalty. Statute of limitations. Code 1892, § 2741.*

A suit for the recovery of interest paid upon a usurious contract, is not for the recovery of a penalty *eo nomine* within the statute (code 1892, § 2741), and is not barred thereby.

4. SAME. *Appropriation of payments.*

Before such a suit can be maintained, the borrower must extinguish the principal debt due the lender, and payments will be applied to such debt until it is satisfied.

5. SAME. *Security of loan. Mortgage on lands in another state.*

The execution of a mortgage on lands in another state, to secure a loan made in this state, does not make the contract one to be governed by the interest laws of such other state.

FROM the circuit court of Lincoln county.

HON. ROBERT POWELL, Judge.

The facts are sufficiently stated in the opinion.

Brief for appellant.

Cassedy & Cassedy, Chrisman & Brennan, and J. B. Chrisman, for appellant.

1. The action is based on § 2348 of the code of 1892, which did not take effect until November 1, 1892, and the contracts by and upon which it is claimed usurious interest was stipulated and received, were made respectively, January 27 and June 18, 1892. The suit is for all interest paid, both lawful and usurious. Under the law in force at the time of the contract, only the excess over the lawful interest could be recovered. Sec. 1141, code of 1880; *Dickerson v. Thomas*, 67 Miss., 777. The statute is penal, and should be strictly construed. Statutes are never given a retrospective operation if any other construction can be given them. *Planter's Bank v. Snodgrass*, 4 How. (Miss.), 621; *Wade on Retroactive Laws*, secs. 34-36; *Hooker v. Hooker*, 10 Smed. & M., 599; *Garrett v. Beaumont*, 24 Miss., 377; *Carson v. Carson*, 40 Miss., 349; *Black on Interpretation of Laws*, 259; *Tyler on Usury*, 374.

2. The money sought to be recovered back was received in Louisiana, it being part of the payment mentioned in the declaration as made December 1, 1894 (\$3,194.50), the payments previously made not being sufficient to extinguish the principal, and to its payment the law would first apply them. *McBroom v. Scottish Mtg. & Land Investment Co.*, 153 U. S., 318. No action, therefore, accrued to the plaintiffs in this state, and the statute will not be given an extraterritorial operation. *Black on Interpretation of Laws*, 91.

3. The evidence of Auze, showing what was said and done by and between the parties, notwithstanding his unqualified declaration that the contract was made in this state, establishes beyond controversy that it was made in Louisiana. What, according to his version, was said in Brookhaven between himself and Becker, the cashier of the bank, prior to the execution of the notes and mortgages, was mere negotiation, a simple application for a loan, and a proposition to secure it by a mortgage on lands in Louisiana. If nothing more had occurred, it

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will hardly be claimed that the appellees could have had specific performance on bill filed for that purpose, tendering to execute the security, or a recovery at law for a breach of the contract. The contract would date from the place of acceptance, and would be governed, as to its validity, by the law of that place. 3 Am. & Eng. Enc. L., 852-857; 13 Am. Dec., 281; 99 Am. Dec., 663 and note.

The rights of parties to a promissory note is determined by the law of the place where it is delivered. 4 Dallas (U. S.), 60.

The proposition of Auze that the bank should make him a loan, and he to secure it by a mortgage on lands in Louisiana, was accepted by Brennan, the agent of the bank, and the notes and mortgages executed and delivered in Louisiana, and the obligation of the bank to advance the money dates from this time. From that moment, for the first time, a contract existed between the parties, valid by the law of the place, and susceptible of being specifically enforced by either party. The money borrowed was for the use of Mrs. Auze, secured by mortgage on her property in Louisiana; the debt was her debt. Her power to contract it, and mortgage her lands to secure it, were granted, on her application, by the courts of that state. She had no power, under the laws of her residence, to make the contract until it was authorized by the proceedings for that purpose, and these proceedings were had, and the respective notes and mortgages were executed and delivered at the same time and place. Being a resident of Louisiana, and the lands with reference to which she contracted being situated there, she could not, by reason of her marital disability, have made such a contract in this state, and this ought to be conclusive as to the place of the contract.

The instructions given for the plaintiff are clearly erroneous in authorizing a recovery for all interest paid. They should have limited the recovery to the excess only, as under the code of 1880, rather than authorizing a recovery under the code of 1892. The two code provisions are materially different, § 1141

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of the code of 1880 providing "that if a greater rate of interest than ten per cent. shall be stipulated for in any case, all interest shall be forfeited;" § 2348 of the code of 1892 that, "if a greater rate of interest than ten per cent. shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory."

In support of the proposition declaring the right to contract with reference to the laws of another state touching the subject of usury, we cite the following authorities, relying confidently upon them to demonstrate the error of the court in refusing the instructions on that subject: *Brown Bros. v. Freeland & Murdock*, 34 Miss., 181; Tiedeman on Com. Paper, sec. 511; 23 Am. St. Rep. (79 Tex., 246), 332, and Bkte, 340; 32 Am. St. Rep. (83 Iowa, 120), 294; 48 Am. St. Rep. (90 Iowa, 300), 442, and note 446; 47 Am. St. Rep. (116 N. C., 882), 841; 88 U. S., 241; 31 Am. Dec., 264; 88 Ga., 756; 15 S. E. Rep., 812; 48 N. W. Rep., 638; 58 Hun (N. Y.), 608; *Sturdevant v. Memphis National Bank*, 9 U. S. C. C. App., 256.

Our contention on this branch of the case is, in short, that the parties, being residents of different states, had a right to contract either in Mississippi or Louisiana as to the rate of interest with reference to the laws of either state; that, in the absence of proof as to the law with reference to which the parties contracted, the presumption is that the contract was made with reference to the laws of that state where the rate of interest stipulated for was lawful rather than the one where it was unlawful; and that the notes, mortgages, court proceedings, and the facts surrounding the transaction, as disclosed by the evidence, leave no room for doubt that the parties actually did contract, as to the rate of interest, with reference to the law of Louisiana, and that, having done so, the case made is not one where the penalties of the Mississippi statute can be imposed or is at all applicable.

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R. H. Thompson, for appellees.

The third plea was demurred to, and the demurrer sustained. The plea was to the first payments, aggregating \$1,252.77, and it averred that the plaintiffs could not recover on account of them, because they were made more than one year before the beginning of the suit. The demurrer to this plea speaks for itself. The plea was to the whole declaration, and set up only a partial, if any, defense. The suit was not for the recovery of the specific payments mentioned in the plea; these payments went to pay the sum actually borrowed, and suit could not have been brought for anything until the whole money borrowed, without interest, was repaid. This is shown not to have been done until within a year before suit brought.

“In accordance with the rule that payments made to the creditor will be applied to the valid part of the debt, it has been held that so long as the whole amount paid does not exceed the debt and lawful interest, the debtor cannot maintain an action to recover back.” 27 Am. & Eng. Enc. L., 961. Of course, this is said, so far as lawful interest is concerned, as to the law of a forum where only excessive interest can be recovered. The rule is equally applicable where all interest can be recovered. *Josey v. Davis* (Ark.), 18 S. W. Rep., 185; *Hankins v. Welch*, 8 Mo., 490; Tyler on Usury, 421 *et seq.*

It is also submitted that this action is not for “a penalty or forfeiture on any penal statute” within the meaning of § 2741, code 1892, and that the one year statute of limitations has no application. While the usury law, § 2348, code of 1892, may be in one sense penal, yet, in a broader and truer sense, it is remedial. In so far as it gives a right of action to sue, it is purely remedial. Even statutes authorizing an action to be brought to recover usury paid within a limited time are regarded as cumulative, and not as prohibiting the common law action at any time within which such action may be brought. 27 Am. & Eng. Enc. L., 962, and authorities cited.

It must be borne in mind, in the consideration of this case,

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and especially of the fourth plea, that every loan and borrowing of money embraces two contracts—(1) the lender's contract, by which he agrees to advance the money upon the terms stipulated. This contract is rarely in writing; and (2) the borrower's contract, by which he obliges himself to repay the debt. This, the borrower's contract, is most frequently in writing, and is evidenced by the promissory notes given to the lender. It is the first, the lender's contract, which is condemned by statute, when a greater rate of interest is stipulated for than ten per cent. The one contract is not necessarily made at the same place with the other. The agreement to loan by a banking corporation, like appellant, is usually made at its banking house; the notes which evidence the borrower's obligations to repay, may be executed elsewhere, and are frequently so executed.

In the case of *Martin v. Johnson*, 8 Lawyers' Reports Annotated, 170, decided March 1, 1890, the supreme court of Georgia says: "The contract of lending and borrowing always includes two agreements—one by the lender to deliver the money, and the other by the borrower to repay it. As the pleas do not allege that the agreement to deliver the money was to be performed elsewhere, the place of delivery was Georgia. It was in the performance of this agreement that the usury was reserved. The whole amount of the money was deducted from the money delivered, and this was done in Georgia. The taint of usury does not result from payment, but from the agreement, performed or unperformed," etc. Is usury, received in Mississippi by deducting it from the loan, less usury because the note for its repayment is executed elsewhere?

Of course, it is of no consequence that the parties did not intend to violate the law. The question is, did they intend to do the act which was a violation of the statute; did they intend to stipulate for a greater rate of interest than ten per cent.? If so, then the law was violated. Even if both parties had mistakenly believed that the legal rate of interest in the state was twenty per cent., yet, if they stipulated for a rate exceeding

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ten per cent., the consequence of the statute would be upon them. *Ignorantia juris non excusat*. A mistake of fact—as, a miscalculation or any inadvertence, may, it is true, be excused. Such are the cases noted in the annotations under § 2348, code of 1892. The averment of the fourth plea that the contract as regards interest was made with reference to the laws of Louisiana, where plaintiff resided, does not help the plea. It is true that where a contract is made in one state, to be performed in another, the law of either place may be adopted. But that is not this case. According to the declaration and the plea, the contract for interest was made in this state, and was to be performed here; even the notes were payable at Brookhaven, Miss. If a citizen of another state comes into Mississippi and makes a contract to be performed here, it is, to all intents and purposes, a Mississippi contract. The averment of the plea that the notes were executed in Louisiana, confuses the contract for which suit is brought (the lender's contract to advance the money), with the obligation of the borrower to repay, and, under the Georgia case, *supra*, does not help the plea. The demurrer was properly sustained, as is believed. But, if I be mistaken in this, appellant had the full advantage of everything averred in the plea under the notice filed with the general issue, and the evidence presented all of said matters to the jury, and they were found by it to be untrue. The taking of mortgages on lands in Louisiana did not govern and control as to the usury law applicable to the transaction. *American, etc., Co. v. Jefferson*, 69 Miss., 770; 27 Am. & Eng. Enc. L., 974, 975; Tyler on Usury.

We have in this case, to show that the loan was made and the illegal interest was stipulated for in this state, the positive evidence of the plaintiff. It could not be made stronger; and, in addition to this, it was admitted by the officers of the bank that negotiations were begun here. It is true the notes, other than the two small ones given only for usury, were executed in Louisiana, but they were made payable here, and *prima facie*

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the interest laws of this state govern. The money was paid to plaintiffs on the loan in this state; \$250 was sent from Brookhaven by express, and this was delivered here to the express company for plaintiffs, and, in legal effect, is the same as if handed to them here; the balance was paid upon plaintiff's checks in Brookhaven, upon presentation here to the bank. Remember, the question is, where did the bank stipulate for unlawful interest? It is the bank's (the lender's) contract, which must be located. So far as this court is concerned, this case must be decided (for there is abundant evidence supporting the verdict) as if the following facts were admitted: (1) The bank (appellant) loaned the money in this state, negotiated for its loan here; (2) the loaned money was paid or passed over to borrowers here; (3) the loan was to be repaid here, and this according to the borrower's notes, too, and it was largely repaid here. This being true, it makes no difference where the borrower's notes were executed, and none that they were secured by a mortgage on Louisiana lands.

But it is argued that Auze's testimony did not establish a binding contract, one that could have been specifically enforced before the execution of the notes and mortgages in Louisiana; therefore, it is contended what was done in Louisiana culminated the contract, and that it was imperfect before. To this there are at least two perfect answers:

1. One of fact. Auze testifies that the first note was signed in blank in Louisiana—Brennan not knowing how to fill it out—and that it was brought back to the bank by Brennan, with authority from plaintiffs for the bank to fill up the blanks. If this be true, and the jury had the right to believe it, this note was really executed in Mississippi. And it will be noticed that in reference to the second loan there was no evidence offered by the defendant disputing what the plaintiff, Auze, said about it. Defendant's evidence all related to the first loan. The only evidence relating to the second loan was that of plaintiff that

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the loan was made and concluded in this state. The note given therefor, however, is dated in Louisiana.

2. But if it be admitted that the contract of the bank could not have been specifically enforced until after the notes were made, it does not follow that the loan was made in Louisiana. Surely a contract of loan can be made in one place and the borrower's notes executed in another. There is nothing legally or physically preventing this. Unless the court is ready to decide that in every case of loan the contract is necessarily made where the borrower's notes are executed, there is nothing in the argument.

Again, very few contracts respecting personal property will ever be specifically enforced by a court of equity. Such contracts must be exceptional and quite peculiar, or they will not be specifically enforced. Such a remedy is almost exclusively confined to contracts concerning land, and in all other cases the aggrieved party can only sue for damages. Hence, inability to specifically enforce a contract of loan is no test of its validity or criterion to determine where it was made. But, still further, the argument proves too much if it proves anything. No court would ever specifically enforce an usurious contract; it would not require the lender to violate the law; it would not require him to loan his money at a less rate than he had contracted to do, for this would be inequitable. So we see the right to specific performance by the borrower cannot determine the right to recover for usury; for, if that be the test, there is no case in which a recovery can be had.

Finally, on this head, to specifically enforce a contract the defendant must be placed in default. Take the ordinary case of a bond for title to land; before the vendor can be required to make deed, the vendee must pay or tender the purchase money. The place of tender or payment may, and frequently is, a different one from the place the contract is executed. The place, therefore, where the act was done which gives the right

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to specific performance, does not determine where the contract sought to be enforced was made.

It is true, as shown by the authorities cited by opposing counsel, that an offer must be accepted; but it does not follow that the two, the offer and the acceptance, may not be made at different places, nor does it by any means follow that the place of the execution of the papers required by the terms of the contract, necessarily fixes the situs of the contract. In this very case the negotiations for the loans, and the loans themselves, were shown by evidence to have been made in this state, the money was passed by lender to borrower here, and it was agreed to be repaid here. The execution of the notes and mortgages required by the lender were probably had in Louisiana, but nothing else was done there.

Take a common sense view of this matter. When were the loans actually made? Certainly not until the money was passed to plaintiffs, not until the bank sent the \$250 by express and paid plaintiffs' checks. And this was done in this state. The negotiations for the loans were had here, and the money was paid here to the order of the borrowers, and it was repayable here. If it be true that a contract is made where the last act is done which is necessary to render it obligatory, then, aside from the blanks in the note, the payment of the money to plaintiffs, in this state, was that act; before that the notes were not obligatory.

Much stress was laid, by appellant's attorney, upon a pretense that to maintain this suit is to give a retroactive effect to § 2348, code of 1892. The first loan was made January, 1892, and the second one in June, 1892. These were consolidated, however, and usurious interest a second time stipulated for, in April, 1893, and the third and large note then given, and the two notes, one for \$145, and one for \$111, wholly for usury, were executed in 1894. Section 1141, code of 1880, which was in force when the loans were made, provides: "And if a greater rate of interest than ten per cent. shall be stipulated

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for in any case, all interest shall be forfeited." The code of 1892 provided: "And if a greater rate of interest than ten per centum shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory."

It will be noticed that the stipulating for excessive interest was unlawful under the code of 1880. So far as the stipulating for unlawful interest is concerned, the two codes are identical. The provision of the code of 1892, "and may be recovered back," etc., not in code of 1880, is purely remedial. The act of "stipulating for" unlawful interest was just as illegal under the old code as it is under the new. So far as the receiving of unlawful interest is concerned, it was all received, in this case, after the code of 1892 had gone into effect.

But it must not be forgotten that in April, 1893, when Auze and wife could have resisted the payment of all interest had they been sued, a new stipulation for usurious interest on the very loans was made by appellants. It then took the third note, consolidating the first two, and carried not only the previous unlawful interest into it, but stipulated for even more unlawful interest. The bank, under the old code, was not legally entitled to any interest, and yet it stipulated, April, 1893, for unlawful and for compound interest.

Code of 1880, § 1141, is penal, why? Because, in the language of the case cited and relied upon by appellant's attorneys, *Planters' Bank v. Snodgrass*, 4 How. (Miss.), 621, "it inflicts a loss of the entire interest, legal as well as usurious, upon the lender." The new provisions of the law, in relation to "stipulating for" unlawful interest, are purely remedial.

So, in this case, we have no new provisions of a penal nature relating to the contract, and we have besides a new contract, a new "stipulation for" unlawful interest after the code of 1892 became operative. But again, I will ask, why was the rule ever established, under the old law, that only excessive interest could be recovered in executed contract? Judge Sharkey tells

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us (*Parchman v. McKinney*, 12 Smed. & M., 631-639,) that it was because of the equitable rule which would not allow a party to recover back what he had voluntarily paid without paying that which he might legally have contracted for. "It has its foundation in the discretion which the courts of equity are said to have possessed in granting or withholding relief. On this foundation, and on this only can it rest." At law "the recovery of the excess may be had in an action for money paid, which being an equitable action, courts of law apply the equitable principle, and will not allow a party to recover back what he had voluntarily paid without paying that which he might legally have contracted for."

These quotations show that the only reason why, both at law and equity, all interest could not be recovered under the old law was simply a rule of the court of equity. It was not because of any merit in a defendant or justice in his case. Legally, he was not entitled to retain any interest, but the court of equity, which was supposed to have a discretion in granting or withholding relief, impressed upon the controversy its own conceptions of what ought to have been done. Courts of law followed this rule when such cases were brought before them in an equitable action.

Surely the legislature can, even in its application to existing or pre-existing contracts, abolish a rule of court. No man has any vested rights in them. No interest was ever due to the Commercial Bank from Mr. and Mrs. Auze, while, under the code of 1880, plaintiffs could not have recovered back anything but the excessive interest, yet, the reason was not predicated of any right in the lender. There has, therefore, been no change by the statute in appellant's rights.

This case ought to be made a warning to usurers. Nothing can be truer than Lord Bacon's aphorism, which, if I remember it correctly, is in these words: "Usury bringeth the treasure of a realm or state into a few hands; for the usurer

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being at certainties, and the others at uncertainties. at the end of the game most of the money will be in the box.''

Woods, C. J., delivered the opinion of the court.

We find it unnecessary to examine, in detail, the many and complicated and voluminous pleadings of counsel, for the reason that on the issues finally joined the defenses were fairly presented by the pleas adjudged good, and all the evidence desired to be offered in support of these pleas was fully presented.

On January 27, 1892, appellees borrowed of appellant \$2,174, and to this principal sum was added interest at the rate of twenty per centum per annum, for which appellees executed their note for \$2,500, with interest thereon, after maturity, at eight per cent. per annum, which note became due and payable on November 1, 1892. On June 18, 1892, appellees borrowed of appellant the further sum of \$1,000, and to this principal sum was added interest at the rate of twenty per cent. per annum, for which appellees executed their second note for \$1,090, with interest thereon, after maturity, at the rate of eight per centum per annum, which note became due and payable on December 20, 1892. Both notes, by the terms in their faces, were payable at Brookhaven, Miss., the domicile of the appellant. Deducting some payments which had been made, there appeared to be due on both of said notes, on April 21, 1893, the sum of \$3,772.27, but this sum was reached by computing interest, after the maturity of the notes, not at eight per cent., as agreed originally, but at twenty per cent. from maturity to November 1, 1893, and thereupon, on said April 21, 1893, appellees executed their third note for said sum of \$3,772.27, due and payable November 1, 1893, with interest at eight per cent. per annum after maturity. This new note, like the two former ones, in lieu of which it was given, on its face was payable, likewise, at Brookhaven, Miss., the appellant's domicile.

The three foregoing notes were dated "Amite City, Louisi-

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ana," and were secured by mortgages, properly executed, on lands of appellee, Mrs. Auze, in that state, she being thereunto authorized by the proper court in that state under the laws thereof.

On May 4, 1894, appellees executed their two promissory notes, payable to appellant at Brookhaven, Miss., one for \$111.77, due June 4, 1894, and the other for \$145.76, due July 4, 1894, and these two notes were given, as it seems, wholly for usurious interest on the original debt.

In satisfaction of all these notes, appellees paid to appellant the sum of \$4,627.92, and this action was instituted to recover all interest paid, because of usury.

The principal contentions on this state of case will readily suggest themselves. Were the contracts of loan Mississippi or Louisiana contracts? Were they made in the one state or the other? and, if made in Louisiana, were they so made with reference to the laws of that state in good faith, and with no purpose to evade our laws on the subject of usury? Is the controversy determinable by the *lex loci contractus* or the *lex solutionis*? It will be remembered that the notes and mortgage executed to secure their payment were made in Louisiana, and were payable in Mississippi, as disclosed by the faces of the notes.

The law in this state on this subject has been briefly but clearly stated in the case of *Brown Bros. & Co. v. Freeland & Murdock*, 34 Miss., 181. The syllabus to the case, prepared by the then reporter, presents with wonderful perspicuity and precision the views of the court, and we can do no better than quote that syllabus.

"1. A contract, as to its nature, construction and validity, is governed by the law of the place where it is entered into.

"2. When a contract is made in one country, to be performed in another, the law presumes, in the absence of any other circumstance, that the parties contracted with reference to the place where it is to be performed; and, in that case, the

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contract, as to its nature, construction and validity, will be governed by the *lex loci solutionis*. But this is a mere presumption of law, and is not inflexible; and it will not control if the attendant circumstances show that the parties contracted with reference to the law of the place where the contract was entered into.

“3. When a contract, made in one country, to be performed in another, stipulates for the payment of a rate of interest allowable by the *lex loci contractus* but prohibited by the *lex loci solutionis*, it will be governed by the law of the place where it was entered into. For, as it was competent for the parties to contract with reference to the law of either place, it will be presumed that they contracted with reference to that law which their contract did not violate. A presumption will never be indulged that a contract is in violation of law when it is capable of any other reasonable construction.”

But these presumptions of law as to execution and performance, are only, after all, presumptions, and must yield to the facts showing what the real intent and purpose of the parties was. In the present case, the conflict on this point, on the evidence, is sharp and irreconcilable. For the appellees, the evidence is that the loan was effected at Brookhaven, the money paid at Brookhaven, and was to be paid back by the borrower at Brookhaven, and that no thought of Louisiana law was in the mind of the parties, nor any word spoken about performance under Louisiana laws. In a word, the appellees' evidence is that it was a Mississippi contract with security for the notes evidencing it on lands in Louisiana. On the other hand, appellant's evidence shows that the contract was made with direct and express reference to the laws of Louisiana, and that W. C. Auze, one of the appellees, is the very person who suggested the plan adopted, by which the extortionate rate of interest might be made unobjectionable in law.

On this conflicting evidence as to the circumstances under which the contract was entered into and as to the intent and

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purpose of the parties, the case went to the jury under fair instructions for appellant. The jury was told by the fifteenth charge given at appellant's request, that if the evidence showed that the contract of loan evidenced by the three notes of January 27, 1892, June 18, 1892, and April 21, 1893, was made in the State of Louisiana, then no recovery could be had for any payments made in settlement of such loan and payment of such notes. Surely, by this instruction, appellant received generous treatment at the hands of the court. The instruction seems to make the legal presumption arising from the execution of the contract in Louisiana conclusive as to their intent to contract with reference to the law of that state, where the contract was legal, and that without considering whether the contract was in good faith, and with no purpose to evade our usury laws, so made in Louisiana.

The other two instructions given for appellant gave appellant the benefit of this too generous announcement as to the two small notes given solely for interest. The danger was that the jury, under all of the appellant's charges, might have relied wholly on the presumptions of law arising from the execution of the contract in Louisiana, disregarding the circumstances of the execution of the contract and the good faith and the intent of the parties as to what state's law should govern in an attempt to enforce performance. But of this danger the appellant cannot complain, and, on the whole law as charged by the court below, we see no reversible error. Several of the refused charges of appellant were plainly erroneous, and if any which were correct were refused, the appellant's defense was certainly submitted fully on the charges given.

The mere verbal changes in § 2348, code of 1892, do not substantially change § 1141 of the code of 1880. The code of 1880 declared a forfeiture of all interest in all cases where a greater rate of interest than ten per cent. was stipulated for; and the code of 1892 declares a forfeiture of all interest in all cases where a greater rate of interest was stipulated for or received.

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So far, at any rate, as the right of action in appellees is concerned, the mere verbal alteration is without any force or effect, and it is a mistake to suppose that any retroactive effect need be given § 2348 of the code of 1892. The forbidden thing—the stipulating for unlawful interest—is in both codes.

It only remains to add that this suit is not for the recovery of a penalty, *eo nomine*, under § 2741, code of 1892, by which actions for penalties *eo nomine* are barred in one year. Besides, the defense on this ground was presented by a plea to the whole declaration, and set up only a partial defense, or, to speak more accurately, attempted to set up only a partial defense. The specific payments referred to in the third plea must be applied to the payment first of the money actually borrowed, and, until this money had been paid, no suit would have been maintainable for any specific lesser sums paid by appellees, and the sum of money actually borrowed had not been repaid more than a year before this action was begun.

The issues joined presented the controverted questions, and, under these issues, all the evidence desired to support the contentions of appellant was laid before the jury, and under such charges as at least fairly instructed the jury for appellant as to the legal principles applicable in the case. On the violently conflicting evidence, the jury might have found, under the instructions, for appellant; but they have not so found, and we do not feel authorized to disturb their finding.

Affirmed.

Syllabus.

74	626
74	608

74	626
180	569

ILLINOIS CENTRAL RAILROAD CO. ET AL. v. R. E. LEBLANC.

1. REMOVAL TO FEDERAL COURT. *Jurisdiction.*

The state court ceases to have jurisdiction of a cause upon the filing of a petition and bond for the removal of the case to the federal court, only when the petition and bond, taken in connection with the whole record, shows a case that is removable under the acts of congress.

2. SAME. *Diverse citizenship. Defendants fraudulently joined.*

The removal of a cause to the federal court, on the ground of petitioner's citizenship of another state, is properly refused, where, in connection therewith, he merely alleges that his co-defendants, like the plaintiff, are citizens of this state, and were fraudulently made defendants to prevent a removal, the case being one in which all of the defendants were sued as joint tort feorsors.

3. EVIDENCE. *Value. Offers to purchase.*

In a suit for damages for the taking of gravel from plaintiff's land, it is incompetent to prove offers to purchase made to plaintiff, and evidence of value based thereon should not be received.

4. SAME. *Prices paid.*

In such case testimony of prices paid for gravel spread upon the streets of a city, there being no evidence as to what it cost to place it on the streets, is incompetent; but if the cost of getting the material from the pit, and its transportation, etc., is shown, such evidence is admissible for consideration with other evidence in determining value.

5. SAME. *Prices received by contractors.*

In such suit evidence of what contractors for paving the streets of a city with gravel received on their contracts, their profits and the amounts paid by the city for their guaranty to maintain the streets not being shown, is incompetent.

6. SAME. *Purposes for which material used.*

In such case it is competent to prove any purpose for which the material could be used.

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7. SAME. *No market value. Actual sales. Other markets.*

Where the property to be valued cannot be definitely graded and has no market standard, but is frequently bought and sold, there is more scope in the admission of evidence in proof of value than in ordinary questions of value; and in such cases actual sales of like property, and market value at other places, accompanied by evidence of the cost of transportation thereto, etc., may be shown; but the value is to be determined from the whole evidence, and not from the prices received from sales in small quantities.

8. MEASURE OF DAMAGES.

Where material has been taken from the land of another under an honest claim of title, or where the trespass was from ignorance, and was not wilful, damages will be confined to the value of the property *in situ*, and such other damages to the land as the taking may have caused.

9. ESTOPPEL. *Volenti non fit injuria.*

Where defendant was in possession of and claimed to own a gravel pit, and plaintiff, doubting the validity of his own title thereto, accepted employment from defendant to load its cars with the gravel, he is not estopped thereby from recovering of defendant the value of the material taken during such employment; and the maxim *volenti non fit injuria* does not apply.

10. EXCESSIVE VERDICT. *Shocking to conscience.*

A verdict which is so excessive as to shock the conscience should be set aside by the court.

FROM the circuit court of Pike county.

HON. W. P. CASSEDY, Judge.

This was a suit at law brought by LeBlanc against the Illinois Central Railroad Company, and a number of laborers in its employ, to recover damages for the taking of gravel from plaintiff's land. For a full statement of the facts in the case, reference is made to the cases of *LeBlanc v. Illinois Central Railroad Co. et al.*, 72 Miss., 669; *LeBlanc v. Illinois Central Railroad Co.*, 73 Miss., 463; and *Illinois Central Railroad Co. v. LeBlanc*, *post*, 650, as well as to the opinion herein. The declaration demanded \$202,479.76; the verdict and judg-

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ment of the court below was for \$60,000 in plaintiff's favor, and defendant appealed.

Mayer & Harris, for the appellant.

Removal to federal court.—The averments of the petition for removal are sufficient, and the appellant had the right, and now has it, under the statute, to remove a case into the federal court when sued in this state by a citizen thereof, on the ground of diversity of citizenship, notwithstanding the fact that it is operating a line of railroad within this state. This is well settled. The determining question is its citizenship, and not its business location or residence; and that citizenship is determined alone by the grant of its charter. In other words, it is a citizen of that state which granted its charter, to wit, the State of Illinois. *Railroad Co. v. Koontz*, 104 U. S., 5; *Shaw v. Quincy Mining Co.*, 145 U. S., 444; *Martin v. B. & O. R. R. Co.*, 151 U. S., 673.

The court will observe that the state court refused the petition for removal without a denial being made of the averments of the petition. In other words, the refusal was on the face of the petition. If the petition stated a case for removal, this was erroneous. It would have been erroneous, even if the averments of the petition had been traversed. In cases where the proceedings for removal are in conformity with the act, the removal is imperative, both upon the state and the federal court; and if the facts upon which the removal is based are contested, it must be done in a formal manner, by pleading and proofs, in the federal court. The question of jurisdiction in such a case belongs to the federal court, and must be determined there. *Dillon on Removals*, 92, note 2; *Dennistoun v. Draper*, 5 Blatchf., 336, 338; *Taylor v. Rockefeller*, 7 Cent. L. J., 349; *Cobb v. Ins. Co.*, 3 Hughes, 452.

That the averments of the petition are sufficient, we maintain. The petitioner showed that it was a citizen of the State of Illinois and not of this state; that the plaintiff was a citizen of the

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State of Mississippi. That made a clear case for removal, except for the fact that sued along with the petitioner were the laborers described in the petition, and the averment is that those laborers were united fraudulently, for the purpose of preventing the right of removal. *Plymouth Co. v. Amador Co.*, 118 U. S., 264; *Louisville R. R. v. Wangelin*, 132 U. S., 599. In this latter case, it is true, the supreme court decided against the removal, but the reason which they gave for their decision supports the right of removal in this case. There the supreme court decided against the right of removal because no fraud was alleged in the petition, while in this case such fraud was alleged. In fact, this petition for removal was drawn with the case in 132 U. S. before the pleader, and in view of that decision. The question of the burden of proof to support the averment of the petition is irrelevant and immaterial here. That would arise upon the motion to remand in the federal court, which has exclusive jurisdiction to determine that question. *Jackson v. Railroad Co.*, 58 Miss., 648. That the wrongful refusal of the state court to remove the cause, and its wrongful subsequent proceeding in the cause, is ground for reversal is clear. After the presentation of the petition and bond in proper form, the jurisdiction is changed, and subsequent proceedings in the state court are void. *Railroad Co. v. Miss.*, 102 U. S., 135; *Gordon v. Longest*, 16 Peters, 97; *Kanouse v. Martin*, 15 How. (U. S.), 198; *Kern v. Huidekoper*, 103 U. S., 485; *Railroad Co. v. Koontz*, 104 U. S., 5; *Davis v. South Carolina*, 107 U. S., 597; *Railroad Co. v. White*, 111 U. S., 134. If the party fails in his efforts to obtain a removal and is forced to trial, he loses none of his rights by defending against the action in the state courts. *Removal cases*, 100 U. S., 457; *Railroad Co. v. Miss.*, 102 U. S.; *Kern v. Huidekoper*, 103 U. S.; *Railroad Co. v. White*, 111 U. S. The court will observe that the point of the error of the court in refusing the removal, expressly reserved in the special bill of exceptions, but also it was again insisted

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upon in defendant's motion to exclude plaintiff's evidence, which was overruled.

Measure of damages.—Our proposition that the court erred in numerous particulars in its rulings in respect to the measure of damages, comes next in order. That proposition needs to be looked at from several points of view.

1. We maintain that, under the circumstances of this case, what the plaintiff was entitled to recover was the value of the material as it lay in the pit, without any augmentation growing out of the labor expended thereon by defendants in getting it out, or the accession of value which it received by and through the fact of transportation from the pit to its place of market or use.

2. We maintain that it was error in the court to allow the plaintiff to prove by himself and other witnesses special sales of limited quantities, whether selected or not, as the basis of computation of value—as, for instance, the pretended offer received from the man April and that from the man Rosenfield, and also the case of the sale to Maurice Hart and that to the city of Brookhaven.

3. We maintain that it was error in the court to allow the plaintiff to attempt to prove a basis of value by showing the price obtained by street paving contractors in the city of New Orleans under their street paving contracts for work done on the streets in which gravel was used, and to endeavor to deduce therefrom, by calculation on insufficient data, the value of gravel at the pit.

4. We maintain that it was error in the court to allow the plaintiff to show, as a basis for his recovery, the use of the gravel by the defendant railroad company as ballast and for other railroad purposes.

5. We maintain that it was error in the court below to allow other than a nominal recovery in this case, in the absence of any proper proof of either a market for the material taken or a market value for the same.

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The law in respect to the measure of damages is as follows:

English rule.—"We have had occasion before to examine the case of trespass committed by mining and carrying away minerals. Here the most essential part of the wrong consists in the removal of the mineral, which is to be estimated at its value at the time the defendant began to take it away—that is, as soon as it existed as a chattel, its value will be the sale price at the pit's mouth, after deducting from it the expense of carrying from the place in the mine where it is got to the pit's mouth, but not the cost of severing it. Separate compensation must be given for all injury done the soil by digging, and for trespass committed in dragging the mineral along the plaintiff's adit. It seems, however, that where there is a real disputed title, the case is different, and the minerals are to be valued as if the soil in which they lay had been purchased from the plaintiff." Woods' *Mayne on Damages*, 1st Am. Ed., top p. 546; 9 Meeson & Welsby, 673; *Word v. Moorewood*, 3 Qu. Bench, 440; *United Merthys Coleridge Co.*, Law Rep., 15 Eq., 46; *Jegon v. Vivian*, Law Rep., 6 Chy., 743; 40 Law Jour., Chy., 389; *Jobe v. Potlin*, Law Rep., 20 Eq., 84; 44 Law Jour., Chy., 262; 8 Meeson & Welsby, 146.

American rule.—"The general rule upon which compensation for injuries to real property is given, is that the plaintiff should be reimbursed to the extent of the injury to the property. The injury caused by the defendant may be of a permanent nature. In such case, the measure of damages is the diminution in the market value of the property. If the injury causes a total or partial loss of the land for a limited time, the diminution in the rental value is the measure. One of these measures is always applicable." Sedgwick on Damages, vol. 3, par. 932.

"When, by a trespass upon real property, trees standing upon the property are destroyed, the value of the trees can be recovered. If the trees are full grown timber trees, this is all that can usually be recovered. If they are fruit or ornamental

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trees, however, the injury goes beyond the mere destruction of the trees. It is an injury to the realty, since the value of that is diminished by more than the value of the trees as timber, because their chief value is for productive and ornamental purposes. The measure of damages when ornamental and fruit trees are cut, is the difference in the value of the realty before and after the trespass." Sedgwick on Damages, vol. 3, par. 953.

"In this case, as in others where labor has been expended upon the chattels obtained by trespass on real property, attempts have been made to recover the value of the chattels after the labor has been expended upon them, upon the ground that the chattels still remain the plaintiff's property, and he had a right to take them where he finds them, or, at his option, to recover compensation for the loss of them at that time. It has accordingly been held in many cases that the measure of damages is the value of the logs immediately after cutting. It would, however, be better not to allow such recovery in an action for trespass upon real estate." Sedgwick on Damages, vol. 3, par. 934.

"Where coal ore or other valuable mineral is wrongfully, in good faith, mined from the plaintiff's land, the measure of damages is generally, and properly, held to be the value of the coal ore taken as it lay in the mine, often estimated by taking the value at the mouth of the mine and subtracting the expense of raising it to the point; or, if the mineral is reduced or dressed there, its value in that state, less the expense reasonably incurred. Some cases hold the measure of damages to be the value of the coal ore directly after it was severed, without allowance for expense of severing, on the ground that the coal ore is at that moment converted, but as the injury is really to the realty, the value of which is diminished by the value of the mineral *in situ*, the rule as stated gives compensation, and is the true rule." Sedgwick on Damages, vol. 3, sec. 935.

"The rule of damages where ore is removed and appropri-

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ated is not only such injury as may be sustained to the land, but, in addition thereto, the value of the ore at the time and place of the removal. Thus, in Pennsylvania, the removal of coal from the lands of a party entitles him to only actual damage to the land and the actual value of the ore in the ground, and not its value after it has been dug." Field on Damages (revised edition), p. 601.

"Where the defendant has been guilty of no intentional wrong, according to the best authorities, the value of the property *in situ* is the measure of damages. The weight of authority, both English and American, now is that where there is honest dispute as to title, or where the trespass has been from ignorance and not wilful, the damages will be confined to the value of the property before the trespass is committed, or, to use the language of the English courts, at the same rate as if the property taken had been purchased *in situ* by the defendant at the fair market value of the district." Am. & Eng. Enc. L., vol. 5, p. 37.

Mississippi.—The rule as laid down in Sedgwick on Damages, and as announced in Woods' Mayne on Damages, and in Am. & Eng. Enc. L., above cited, is the rule in this state. See *Heard v. James*, 49 Miss., 236.

It is true that the rule expressed in the foregoing case is declared in *Peterson v. Polk*, 67 Miss., 163, to be dictum; and whether this court would follow is left open. But in point of fact the rule is in entire harmony with the overwhelming current of authority, as will be shown herein.

Iowa.—"In the absence of wilful wrong, the measure of damages is the value of the mineral unmined, or, what is the same thing, its value mined, less the reasonable cost of mining it." 45 Iowa, 429; 55 Iowa, 88; 70 Iowa, 166. "Defendant purchased the right to make hay on plaintiff's wild land of one whom he believed to be authorized to sell such right, but who had, in fact, no such authority. The uncut grass was worth no more than ten cents per acre, while the hay made from an

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acre was worth three or four dollars. Plaintiff sought to recover the value of the hay. Held, that he could not so recover." 77 Iowa, 190.

Nevada.—"In all actions sounding in tort, no fraud or culpable negligence appearing, the injured party is entitled to full compensation for his loss, and no more. Expressly adopting rule laid down in 45 Iowa, 429." 13 Nev., 157.

South Carolina.—Defendant took phosphates, believing he had a right to them. Held, that the measure of damage was the value less the amount added by defendant's labor. 22 S. C., 50.

Tennessee.—Acting in good faith in taking coal, the damage is the value of the coal *in situ*. 15 Lea (Tenn.), 300; 15 Lea (Tenn.), 480. The weight of authority, where there is a dispute as to title, is the value of the property taken *in situ*. 86 Tenn., 1.

Pennsylvania.—Where the act is by one acting in good faith under a claim of right, the measure of damage is the value of the mineral *in situ*. 41 Pa. St., 291; 62 Pa. St., 252; 108 Pa. St., 147. In an action of trespass for cutting timber, its value is to be determined by the price in the vicinity, and not by evidence of net value in a distant market. 63 Pa. St., 212.

New York.—The difference in the value of land before and after severance of timber is the proper criterion. 82 N. Y., 308; 29 Barb., 9.

Massachusetts.—The lessor of a mine may recover damages from one who has wrongfully taken ore from his mine, the value of the ore, when such value per ton is less than the royalty per ton paid by the lessee; but the value of the ore is to be estimated as it lay in the bed, and not as it was after this value had been increased by the trespasser raising it to the surface. 102 Mass., 80.

Missouri.—In an action for wrongfully mining and digging coal, if it appears that the defendant's act was not wilful, the true measure of damages for the coal taken is its value at the

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mouth of the mine, less the cost of severing it and delivering it at the mouth. 72 Mo., 635.

California.—A trespasser is liable for the value of the gold, less the cost of extracting it. Held, not liable at all for converting gold-bearing soil, when the cost of extracting the gold was greater than the value of the gold extracted. 58 Cal., 190. The expense of digging gold-bearing earth must be deducted. 30 Cal., 481.

Minnesota.—When one in good faith, believing that he has a right to do so, wrongfully cuts and removes trees, the damages are the value of the trees standing on the land. 30 Minn., 481. Defendant peaceably entered on the premises in controversy under a *bona fide* claim of title, and cut and removed grass growing thereon. The title having been subsequently adjudged to be in the plaintiff, held, in an action by him for the conversion of the hay, that the proper measure of damages was the value of the grass standing on the land, not the value of the hay after it had been severed. 38 Minn., 250.

New Hampshire.—In an action of trespass *quare clausum fregit* for cutting down and carrying away trees, the increased value of the trees caused by the labor of the defendant in converting them into timber is not to be included. 54 N. H., 470.

Vermont.—In an action to recover the value of logs taken in the absence of wilful trespass, the measure of damages is the value of the logs in the woods from which they were taken, and not at the mill where they were taken to be sawed.

North Carolina.—Same rule as above. 13 Ired., 147.

Ohio.—Same rule as above, applied to the innocent purchaser of timber. 32 Ohio St., 571.

Michigan.—Same rule in respect to taking and carrying away ice. 44 Mich., 229.

United States supreme court.—In the case of an unintentional or mistaken trespasser, or innocent vendee from such trespasser, the value at the time of conversion, less the amount that he and his vendor has added to its value. 106 U. S., 432.

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Some of the writers say that the weight of authority, where there is dispute as to title, is that the measure of damages shall be the value of the minerals *in situ*, or the trees standing. This is not, however, an entirely correct statement, because we find no conflict of authority whatever on this rule. We have found no case anywhere that holds differently, so it should be stated that the settled rule, both in England and America, is as we have stated. It would seem, then, in the application of these principles to the LeBlanc case, the only question would be whether or not there was an honest dispute as to the title. But this does not admit of question. The railroad company was the owner of the lands in question. Without the knowledge of the railroad company, the land was assessed by the local assessor of Pike county for taxes, and sold. In the meantime the time for redemption expired, and LeBlanc acquired the title. The railroad company, however, being still in possession and still claiming title to the land, and believing that the action of the tax assessor in selling the land was invalid and illegal, filed its bill in the chancery court to cancel the title of LeBlanc, and the court sustained the view of the railroad company, and decreed in its favor, cancelling LeBlanc's title, and, furthermore, enjoining LeBlanc from interfering in any way with the use of the land of the railroad company. LeBlanc took an appeal to the supreme court, and there the case was reversed, and the railroad company immediately relinquished possession. There could be no question here as to the honest dispute over the title, and it seems that that would answer the question, and determine the character of the railroad company's acts and the measure of damages.

The foregoing authorities fully maintain our first position under this title of "Measure of Damages," to wit, that what the plaintiff was entitled to recover was the value of the material as it lay in the pit, without any augmentation growing out of the labor expended thereon by defendants in getting it out, or the accession of value which it received by and through the

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fact of transportation from the pit to its supposed place of market or use. The rule of law established by those authorities is directly violated by the whole theory of the plaintiff's case and by each and every step of the court, both in the admission of testimony for the plaintiff and the exclusion of testimony for the defendant, and in the refusal of defendant's instructions requested, especially by the refusal of defendant's seventh, eighth and ninth instructions, and by modifying the defendant's twelfth and thirteenth instructions by striking out therefrom the words "as it lay in the pit." If we were to undertake to recapitulate all the instances in which that legal principle was violated by the court, it would require us to set forth here nearly all the testimony in the case. A glance over our abstract will show this to be true. Without going into such detailed particulars, we therefore present this point as being fundamental in the case and underlying its whole trial.

Cassedy & Cassedy and J. H. Price, for appellee.

The rule of damages as given by the court in its instructions was, in short, the value of the gravel at the pit, after being excavated and severed from the body of the hill, less the cost of excavation and severance. We are aware that there is a diversity of opinion in the American courts as to the true measure of damages in such cases, one class of causes, based upon English decisions, holding that if the trespasser was guilty of no intentional wrong, he should be charged with the value of the material *in situ* with such other damages to the land as his mining may have caused; the other class of cases establishing the rule that the plaintiff would be entitled, independently of circumstances of aggravation, to recover the value of the material immediately upon its conversion into a chattel by a severance from the freehold without abatement of the cost of severance. Other cases hold the same doctrine, but allow deduction of cost of severance. The latter rule was the one adopted by the lower court in this cause. The rule predicated

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upon the English authorities was the one the railroad company sought to have applied by the lower court, but that court refused all the instructions asked propounding that rule. *Blaen Avon Coal Co. v. McColloh*, 59 Md., 403 (43 Am. Rep., 560), is a leading case sustaining the second rule herein mentioned, and the following are other cases enunciating the same rule: *Bennet v. Thompson*, 13 Ired. (N. C.), 146; *Moody v. Whitney*, 38 Me., 174; *Maye v. Pappan*, 23 Cal., 336; *McLean Coal Co. v. Long*, 81 Ill., 359; *McLean Coal Co. v. Lennox*, 91 Ill., 561. And *Austin v. Huntsville Coal & Mining Co.*, 72 Mo., 535, is a case that adopts the same rule with the qualifications that, where the trespass is neither wilful nor negligent, the measure of damages is the value of material, less the cost of severing and raising. In *Heard v. James*, 49 Miss., 236, this court sustained a verdict for the value of staves where no deduction was made for the cost of converting the trees cut into staves, but this was a cause that the court regarded as one of wilful trespass in cutting the timber out of which the staves were manufactured, and we regard it as practically adopting the Missouri rule.

In *Peterson v. Polk*, 67 Miss., 163, which was a suit in replevin for staves that had been manufactured out of timber wrongfully cut upon the plaintiff's land, the defendant in that case had permission to cut timber upon lands adjoining the plaintiff's, and he applied to the plaintiff to buy his timber, which he declined to sell, but warned him not to cut any trees on his land. He asked the plaintiff to run the dividing line, but this he declined to do, as unnecessary, and referred him to a colored man, Stewart, to point out the line to him. He applied to Stewart, who ran a line for him, which was wrong, and, treating this line as the proper one, by mistake, he cut the trees on plaintiff's land that he manufactured into staves. Upon the trial the court gave the following instruction: "In assessing plaintiff's damages the jury must be governed by the following rules, that is, if the jury believe from the evidence

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that defendant cut plaintiff's trees by mistake and in good faith, believing that they belonged on land not plaintiff's, then the measure of damages is the value of the staves made from the trees, less the costs of cutting and hauling and reducing the timber to staves. But if the jury believe from the evidence that the defendant wilfully and knowingly cut plaintiff's trees, or, knowing that he was near the line of plaintiff's land, negligently omitted to take such reasonable precaution as might have enabled him to ascertain whether or not they were plaintiff's trees, then the jury must assess the damages at the value of the staves at the time and place they were seized by the officers."

This instruction was approved by this court, but at the same time it was announced that, in doing so, the court was not to be held as approving the rule announced for the measurement of damages in those cases in which the defendant has innocently added value to the personal property of the plaintiff by his work and labor. "The defendant," says the court, "in this case has no just cause of complaint, but whether the plaintiff is, under such circumstances, bound to make allowance for such work, we do not decide. In *Heard v. James*, 49 Miss., 247, there is a dictum to this effect. Whether it is the law we are not now called on to say." The court seems to have been of opinion that the rule stated in *Heard v. James* as to the allowance for cost of change in the material, etc., being deducted from the value of the improved article, where the original trespass was through mistake and innocence, was not the correct rule, and it is left open; but we take it that these cases establish the rule that the value of the article, after severance and when it becomes a chattel, is the measure of damages, without regard to the character of the taking. However the real measure of damages may be, whether the value of the gravel as it lay in the pit or its value after having been severed from the land, we can see no practical difference in the two rules, for, in their practical operation, the result must be the same.

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If the true rule be its value as it lay in the hill, this can only be ascertained by an inquiry as to its market value after being taken from the hill and placed upon the market as gravel, and this market value can only be ascertained by taking into consideration the cost of excavation and transportation to the place of market and what it would sell for, and this, after deducting such cost, would be its market value. So that both rules practically proceed upon the same line of investigation and reach the same result. It seems to us that the books contain a vast amount of learning in attempting to draw a distinction without a difference.

An effort was made to remove the case to the federal court on the ground that a controversy was involved between citizens of different states, the Illinois Central Railroad Company claiming that it was and is a citizen of the State of Illinois, because incorporated there, although operating this particular line of road under a Mississippi charter as lessees of the Chicago, St. Louis & New Orleans Railroad Company.

The action was against the Illinois Central Railroad Company and those it had employed in removing the gravel, citizens of Pike county, in this state. They were treated as joint trespassers and sued accordingly. We take it there will be no serious contention that the employment of these defendants by the railroad company to commit a trespass exempted them from liability to the injured party. They are all treated as joint tortfeasors in the declaration, and it does not appear from its allegations that they were employees of the railroad corporation. Removal was sought under the act of congress of August 13, 1888. U. S. Statutes of 1887-1888, page 433 *et seq.*

The case as made by the declaration and as it stood at the time of the filing of the petition for removal is the test of the right to remove. 132 U. S. Rep., 571. The question as to whether it was a severable controversy is to be determined from the record in the state court, unaided by the allegations of the petition or affidavit for removal, and so tested it was

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not a severable controversy. 118 U. S., 596; 119 *Ib.*, 502; 122 *Ib.*, 513; 132 *Ib.*, 599; 144 *Ib.*, 527. See, also, Act of Congress, 1875, Supt. Rev. Stat. U. S., vol. 1, 1874-1881, pp. 173, 174, 175.

Argued orally by *Edward Mayes*, for appellant, and by *H. Cassedy*, for appellee.

WILLING, Sp. J., delivered the opinion of the court.

This is an action of trespass, brought in the court below by the appellee to recover of the appellant and ten others who were joined with it as defendants, damages for entering upon the lands of the plaintiff and removing therefrom a quantity of gravel, rock, stone, etc. At the return term of the court, the appellant presented its petition, which was sworn to, and bond for the removal of the cause to the federal court. The petition stated that the railway company was a citizen of the State of Illinois, it being a corporation created under the laws of Illinois, and that the plaintiff was a citizen of the State of Mississippi, and that the other defendants were citizens of the State of Mississippi, and had been fraudulently joined with the railway company, as defendants, to prevent a removal by it of the cause to the federal court. The action of the court in denying the application is assigned as error.

It is claimed by the appellant that the circuit court ceased to have jurisdiction of the case upon the filing of the petition and bond for removal. That is true, if the petition, taken in connection with the whole record in the case, showed a case that was removable under the acts of congress. Did the petition of appellant, taken in connection with the whole record in this cause show that the appellant had the right to have it removed to the federal court? In *Insurance Co. v. Isador Pichner*, 95 U. S. R., 183, the court say: "This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the stat-

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ute. His petition for removal, when filed, become a part of the record in the cause. It should state facts, which, when taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot proceed further with the cause. Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended."

Counsel for appellant have cited the cases of *Canal Co. v. Plymouth Co.*, 118 U. S. R., 264, and *Railway Co. v. Wangelin*, 132 U. S. R., 599. The first case was a suit by the canal company, in one of the state courts of California, to enjoin the Plymouth Company and others from polluting a stream of water running into the canal of the canal company, and for damages for what had been done in that way. The Plymouth Company filed a petition to remove the cause to the federal court, on the ground of a diversity of citizenship and that there was a separable controversy between the plaintiff and the Plymouth Company. It stated that there was a separable controversy between it and the plaintiff, and that the other defendants were not necessary or proper parties defendant to the action; that they were merely nominal and formal parties defendant to the suit, and had no interest in the controversy involved, but were sham defendants, sued in the action with the petitioner to prevent the cause being removed by it to the federal court. The court, in holding that the case was improperly removed to the federal court, says: "Upon the face of the complaint, there is in this suit but a single cause of action, and that is the wrongful pollution of the water of the canal by the united action of all the defendants working together. Such being the case, the controversy was not separable for the purpose of removal, even though the defendants answered separately, setting up separate defenses. . . . So far as the complaint goes, all the defendants are necessary and proper parties. A judgment is asked against them all, both for an injunction and

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money. Hayward and Hudson are admitted by the answer to be officers of the corporation, and Montgomery its superintendent. These persons are all citizens of California, and amenable to process in that state. It is not denied that they are all actively engaged in the operations of the company. . . . It is possible also that the company may be guilty, and the other defendants not guilty, but the plaintiff, in his complaint, says they are guilty, and that presents the cause of action to be tried. Under these circumstances, the averments in the petition that the defendants were wrongfully joined to avoid removal, can be of no avail in the circuit court upon a motion to remand, until they are proven, and that, so far as the record discloses, was not attempted."

In the other case cited, the court, in deciding that an action brought in a state court against two jointly for a tort cannot be removed by either of them, upon the ground of a separable controversy between the plaintiff and himself, says: "It is equally well settled that in any case the question whether there is a separate controversy which will warrant a removal, is to be determined by the condition of the record in the state court at the time of filing the petition for removal, independently of the allegations of the petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

As to the suggestion, made in argument, that the Southeast & St. Louis Railway Company was fraudulently joined as a defendant to deprive the Louisville & Nashville Railroad Company of the right of removal, the court says: "It is enough to say that no fraud was alleged in the petition for removal, or pleaded or offered to be proved."

The averments in the petition filed in this case for removal, as to the wrongful joinder of its co-defendants, are as follows: "Your petitioner further shows that the co-defendants of your petitioner are citizens of the State of Mississippi; that the cause

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of action declared upon in this case is trespass *vi et armis*, whereby and wherein your petitioner is charged, together with said co-defendants, with invading the close of the plaintiff and taking up and taking away, for its own use, gravel, sand, earth, etc., from said close. Your petitioner avers that its co-defendants are common day laborers, not responsible or coercible at law, and were merely the day laborers engaged in the work of taking and removing, etc., under the employment and operation of your petitioner, without any claim of right to or interest or benefit in the matter involved; and your petitioner avers that the said plaintiff did join each and every of said co-defendants of your said petitioner in the suit, fraudulently, for the purpose of depriving your petitioner of its right to remove this cause from this court into the circuit court of the United States," etc.

The petition not only fails to show that the co-defendants of the petitioners were wrongfully joined as defendants, but shows that they could be joined. Under the circumstances, a mere general allegation in the petition that the other defendants were fraudulently joined to prevent a removal would not avail. The lower court did not err in denying the application and in proceeding in the cause.

On the trial of the cause, there being no dispute as to plaintiff's title, the contest was over the measure of damages sustained. The court permitted evidence to go to the jury, over appellant's objection, (1) as to offers made by one April and Rosenfield to purchase gravel of the plaintiff, and as to the value of the gravel in controversy based on those offers, as testified by the plaintiff himself; (2) as to various sales of gravel made from 1890 to 1896, at the pit, at Brookhaven and in the city of New Orleans; (3) evidence as to the price obtained by street paving contractors in the city of New Orleans under their street paving contracts with the city for work done on the streets, as testified to by Rosenfield, Collom, and others; (4)

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evidence showing that the railway company had used part of the gravel taken from the pit for ballasting its track, etc.

The objections to the evidence as to the offers made to plaintiff to purchase gravel, and as to the value of the gravel, based thereon, should have been sustained. *Railway Co. v. Ryan*, 64 Miss., 399.

The testimony of Hoskins as to the price paid for gravel spread by him upon the streets of Brookhaven, was not admissible, there being no evidence as to what it cost to place it on the streets. We think the evidence as to other sales, where the cost of getting it from the pit and on the cars, and of transportation, was shown, was admissible to be considered by the jury in connection with the other evidence in determining the value of the gravel in question.

“Where the property to be valued cannot be definitely graded, and therefore not susceptible of valuation by a precise market standard, but, being property which is frequently bought and sold, and has, in some sort, a market value, there is more scope for testimony in the proof of value. . . . Value may be shown by evidence of actual sales of other property similar to that in question; and it is competent to prove the value of other like property by which the property in question may be compared. . . . Where there is no market value at a particular place, proof may be given of the market value at other places, with the cost of transportation,” etc. *Sutherland on Damages*, vol. 1, pp. 796, 798, 799.

The evidence as to prices received by New Orleans street contractors was, in substance, as follows: Rosenfield testified: Was president of the Rosetta Gravel Co., of the city of New Orleans; handled and sold gravel; bulk of their gravel came from Rosetta pit, on the Yazoo & Mississippi Valley Railway, 150 miles from New Orleans; some from Illinois Central Railroad, etc.; transportation on their cars cost \$1.25 per cubic yard; their gravel was used to pave streets in New Orleans; was paid for at the rate of \$1.25 per surface yard, laid down,

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with five years guaranty to keep streets in order. Collom testified: Was contractor in New Orleans, and associated with Morris Hart, and acted as manager of the Rosetta Gravel Co.; gravel is used in New Orleans to pave streets and ballast street railroads; he handled for Rosetta company 10,000 or 12,000 cars of gravel to pave street railroads (2,000 or 3,000 per year); the company's pits were at Rosetta and Chatawa; gravel was purchased by the Rosetta company at \$16 per car, delivered in New Orleans, and the company received \$45, laid down on the streets; Chatawa is 90, and Rosetta 123, and Brookhaven 135 miles from New Orleans; quantity from the different pits not known; we were paid by the city \$4.50 per cubic yard; cost of hauling and handling about sixty-five cents per cubic yard.

The evidence as to the prices received for the work by the street contractors was incompetent, as it failed to furnish sufficient data to enable the jury to deduce the value of the gravel in question, as the profits made by the contractors under their contracts with the city and the amount paid them for guaranteeing the work for five years was included in the amount paid for the work, and was not known.

As the plaintiff had the right to show any purpose for which the material could be used, it was competent for him to prove that it was used by the railroad company for ballasting its track, etc.

The appellant also claims that the court erred in the instructions given for the plaintiff, and in refusing instructions asked by the appellant. The second instruction given for the plaintiff was as follows: "The court instructs the jury for the plaintiff that he is entitled to recover the actual value of the gravel at the time of the taking and conversion by defendants, and, in arriving at such valuation, they may take into consideration the uses to which said material was put, and its adaptability to such uses, and the prices paid therefor; and in arriving at a fair value they may deduct the cost of securing it from the hill and transporting it, and all costs necessary to place it on the

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market, as shown by the evidence, and such value as the jury may find the gravel was worth they shall assess in their verdict as damages sustained by the plaintiff."

The court refused several instructions asked by the railroad company, but we only deem it necessary to notice the following: "The court instructs the jury that the plaintiff can only recover the actual value of the material as it lay in the pit."

Formerly there seemed to have been some conflict in the decisions as to the measure of damages where trees had been cut or material taken from the land of another, growing out of the common law forms of action, a different rule sometimes having been applied for the same injury where the action was in trover or replevin instead of trespass. The tendency of the courts has been to look less to form and more to the substantial object of all rights of action, which is to redress the injury by just compensation. The weight of authority, both in England and America, is that where coal or other material has been taken from the land of another under an honest claim of title, or where the trespass was from ignorance and was not wilful, the damages will be confined to the value of the property *in situ*, and such other damage to the land as the mining may have caused. 5 Am. & Eng. Enc. L., 37; 3 Sedgwick on Damages, sec. 955.

The rule as above stated was adopted by the supreme court of Pennsylvania in *Forsyth v. Wells*, 41 Pa. St., 291, and by the supreme court of Tennessee in *Coal Creek Co. v. Moses*, 15 Lea, 300, after a review of all the authorities, both English and American. There does not appear to have been any decision in this state directly announcing a rule for the measure of damages in cases like the one before us. In *Heard v. James*, 49 Miss., 236, the action was replevin for staves made from timber cut from plaintiff's land. This court held the trespass to be wilful, and Judge Simrall, in delivering the opinion of the court, took occasion to say that damages in the action of replevin rests much upon the same grounds as trespass, and

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that the damages to be assessed depended upon the motive which prompted the act of the defendant, whether *bona fide* or actuated by wilfulness and a disregard of the rights of others, should be considered by the jury. The case of *Peterson v. Polk*, 67 Miss., 163, was also an action of replevin for staves made from trees cut from the land of the plaintiff, in which the trespass was held to be wilful. The judge who delivered the opinion pronounced as dictum what was said in *Heard v. James* as to the measure of damages in replevin, and stated that this court should not be held as approving or disapproving the rule announced in that case.

We think the court erred in the second instruction given for the plaintiff in assuming that there was a market demand for the plaintiff's gravel and in making the market price, less the cost of taking it from the pit and cost of transportation as shown by sales of gravel only, the only rule by which the jury were to determine the value of the plaintiff's gravel.

In the case of *Omaha Co. v. Tabor*, 13 Col., 41, the action was trover for the conversion of ore wrongfully taken from the plaintiff's mine. The defendants had sold the ore, and the court held the measure of damages to be the value of the ore sold, less the cost of taking it from the mine and cost of transportation. The rule stated in plaintiff's second instruction would be the correct rule for ascertaining the value of ore or other material before it was taken from the mine, where there was a sufficient demand for it to give it a market value. In this case Rosenfield testified that gravel could not be shipped to New Orleans and sold like cotton and corn, and that all the gravel used there was furnished by parties who had contracts in advance for its use and sale. Collom stated there was no market price in New Orleans for gravel, but if good gravel was shipped there and offered at a lower price it could have been sold. Mitchell did not know of any price for gravel in New Orleans outside of street paving. The gravel furnished was sent by parties who had contracts for work before shipping.

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Bartlet testified that five loads would supply the private demand for a year, and that there was no market in New Orleans for gravel in 1892, 1893, 1894 and 1895. Other witnesses testified to the same effect. Brown, city engineer, did not know of any market price for gravel in New Orleans. Almost all the gravel used was shipped in by companies owning it.

The record of the chancery suit, which terminated with a final decree by this court in *LeBlanc v. Illinois Central Railroad Co.*, 72 Miss., 669, was put in evidence. We think that record shows that the railroad company was setting up an honest claim of title to the lands on which this pit was situated. It was while that contest was going on that this gravel was removed by it. None was removed after the decree was rendered. We think that the plaintiff is only entitled to recover the value of the gravel before it was taken from the pit. That should have been determined, not from the price received from sales of gravel in small quantities alone, but from the whole evidence. Plaintiff's second instruction should have been modified and the appellant's instruction given.

It appears from the evidence that from March to August 17, 1892, the appellee was engaged in loading the cars of the railway company with gravel taken from his pit, under a contract by which he was to be paid by it nine cents per cubic yard. During that time about 1,800 car loads of the gravel in question were taken from the pit by the appellee. It is claimed by the appellant that he is not entitled to recover for the same, under the maxim *volenti non fit injuria*. The railway company was in possession and was claiming the pit, and appellee was doubtful of the validity of his title as against the claim of the railway company. Under the circumstances he should not be deprived of the right to recover the actual value of the material. *Evans v. Miller*, 58 Miss., 120. The verdict and judgment in this case, under any view, was not warranted by the evidence, it being so large as to shock the conscience.

Reversed and remanded.

Syllabus.

74	650
80	740
74	650
85	233

ILLINOIS CENTRAL RAILROAD CO. v. R. E. LEBLANC.

1. CIRCUIT COURT. *Jurisdiction. Ejectment. Constitution 1890, § 160.*

The circuit court has jurisdiction generally of an action of ejectment, and is not deprived thereof by § 160 of the constitution of 1890.

2. SAME. *Constitution 1890, § 147.*

The circuit court having entertained jurisdiction of this case—an action of ejectment—wherein plaintiff's title was proved by a tax deed and a decree of the chancery court confirming the same, this court is precluded, by § 147 of the constitution 1890, from reversing for want of jurisdiction, even if, by § 160 of the constitution, the remedy in the particular case should have been sought in the chancery court.

3. TAX DEED. *Decree confirming. Ambiguity. Code 1892, § 3776.*

Under § 3776, code 1892, in an action of ejectment on a tax collector's deed and a decree confirming the same, wherein the land is described as "fractional thirty-eight acres" in a certain forty-acre tract assessed to a certain party, it is admissible to offer in evidence the assessment rolls, tax receipts and deeds which identify the remaining two acres, on which the taxes were paid, and thereby identify the land sold for taxes, and the description in the decree of confirmation may be thus aided as well as the tax deed.

4. SAME. *Railroad right of way. Superstructure.*

A decree confirming a tax title to land, made under the general law of taxation, and not under the special provisions of the code of 1880 for the taxation of railroads, over which a railroad company's right of way extends, and which decree removes all clouds from the title of the owner of the tax deed and adjudges it a perfect title and cancels all interest, claim or privilege of the railroad company to the land, carries the easement or right of way, even if the tax title thereto was invalid, but it does not carry the railroad company's track and superstructure.

5. RAILROAD. *Ejectment for right of way.*

While ejectment can be maintained against a railroad company for the possession of its right of way, yet execution of such a judg-

Statement of the case.

ment should be stayed for a reasonable time, to enable the company to institute and prosecute a condemnation proceeding to acquire a right to the way.

6. LAND. *Eminent domain. Improvements. Public purposes.*

The general rule that things affixed to the freehold by trespassers belong to the owner of the soil, is not applicable as against a body having the right of eminent domain and who has wrongfully entered and made improvements for the public purposes for which it was created and given the right.

FROM the circuit court of Pike county.

HON. W. P. CASSEDY, Judge.

In 1886 the Illinois Central Railroad Company, the lessee, and the Chicago, St. Louis & New Orleans Railroad Company, the lessor, jointly condemned about sixteen acres of land in section 11, adjacent to their main track near Chattawa, Pike county, and acquired the same in an eminent domain proceeding, from which to obtain gravel for the purpose of ballasting the road-bed, and established gravel pits thereon. The land, and that in section 14, just south of it, was assessed by legal subdivisions, including the right of way in both sections, on the general assessment roll of the county for the taxes of the year 1890, and, notwithstanding the railroad companies paid their taxes for said year under the laws then in force for the taxation of railroads, the lands, while so assessed, in both sections were sold by the tax collector in March, 1891, for the taxes of 1890, and they were purchased at said sale by L. C. and M. Lenoir, to whom a regular tax collector's deed was executed. After the lapse of one year from the tax sale, the grantees in the tax deed sold to LeBlanc, who at once proceeded to drive the railroad employes from the gravel land. The railroad companies then enjoined LeBlanc from interfering with the laborers in the gravel pits and from preventing the appellants' use of the gravel. The bill sought to redeem the lands from the tax sale, upon the idea that sec. 79, constitution of 1890, gave two years for redemption, and, independently of the re-

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demption, to cancel the tax deed to the gravel lands. LeBlanc made his answer in the suit a cross bill, and sought to confirm his tax title to the gravel lands and to the lands in section 14 as well.

The chancery court of Pike county, by its decree, canceled LeBlanc's tax title to the gravel lands, and to the railroad right of way over section 11 and section 14, but confirmed it as to the other lands in his deed. LeBlanc appealed therefrom to the supreme court, and the case is reported, 72 Miss., 669. The supreme court affirmed the decree of the chancery court so far as it related to the right of way in section 11, and confirmed LeBlanc's tax title as to all other lands embraced in it. The confirmation, however, of the tax title to the right of way in section 14 was caused, as was contended, by an error in entering the supreme court judgment, court and counsel overlooking the fact that a part of the railroad right of way was located on section 14. This error being discovered, a motion was made in the supreme court, after the adjournment of the term, to correct the decree, which motion was overruled. The motion is reported, 73 Miss., 463, and to the case as previously reported, on the appeal and on the motion, reference is made, as well as to the opinion herein, for additional facts involved in the present case.

R. H. Thompson, for appellant.

Has the circuit court jurisdiction of ejectment suits? It is recognized that sec. 147, constitution, would prevent a reversal if there be no other error in the record, but I so confidently believe other errors will be found that I proceed to say: All jurisdiction is expressly provided for by our constitution. The jurisdiction conferred on our courts by the constitution not only embraces all subjects, but that conferred on each is exclusive, except where concurrent jurisdiction is expressly provided for in the instrument itself. The circuit court is not given any specific grant of jurisdiction. It is a residuary legatee, so to speak; it only has such jurisdiction as is not vested in some other court. The language of sec. 156, constitution, is the

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equivalent of saying the circuit court shall not have jurisdiction of matters vested in other courts. By no sort of reasoning can a circuit court be held to have jurisdiction of (a) matters in equity, or (b) divorce and alimony, and the legislature is without power to confer it. If the chancery court's jurisdiction of the subject-matters mentioned in paragraphs (a) and (b) of sec. 159, constitution, is exclusive, it is certainly so of the subject-matters of paragraphs (c), (d), (e) and (f) thereof. If this is true, why is it not true of the jurisdiction conferred on the chancery court by sec. 160, constitution? By that section the chancery court, in suits to try titles, etc., is given jurisdiction "to decree possession, and to displace possession and to decree rents," etc. It must be noted that by paragraph (f), sec. 159, the chancery court has exclusive jurisdiction of "suits to try titles," etc. That the jurisdiction of our courts generally is exclusive, is shown most conclusively by the fact that the constitution provides for concurrent jurisdiction, itself creating the only exceptions to the general rule, sec. 161. Where a general rule is announced by, or is deducible from, a constitutional or statutory enactment, and the same law specifies the exceptions thereto, it is almost conclusive that cases not found in the express exceptions are within the general rule. The notes under § 500, code 1892, show the extent to which this court has gone in the matter of equity jurisdiction in land suits; and all this is now made constitutional jurisdiction by paragraph (f), sec. 159, constitution. The mind cannot conceive of an ejectment suit the facts of which would not justify, if it be a case of merit, a suit in equity, or the facts of which could not be rightfully brought before a chancery court and full and complete relief be there given. If this be true, such controversies can only be rightfully brought in the chancery court. This court has decided that the jurisdiction of justices of the peace in actions of tort is constitutional rather than statutory. *Illinois, etc., R. R. Co. v. Brookhaven Machine Co.*, 71 Miss., 663. The logic of this decision is that justices of the peace have

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jurisdiction of ejectments for lands worth less than \$200, if the jurisdiction thereof is at law; the only escape is to place ejectments in the chancery court.

The next question is, had the circuit court jurisdiction of the particular controversy? The point here made is that the chancery court had first obtained jurisdiction. If one court correctly obtains jurisdiction of a suit, its right to hear and determine the cause is exclusive of all other courts. Sec. 147, constitution, does not affect this rule.

Certainly, in this case, the chancery court of Pike county first obtained jurisdiction of Mr. LeBlanc's cause; it did try appellee's title, and it did—or this court on appeal therefrom did, which is the same thing—adjudge his title to be good; it canceled appellant's title to the land now in controversy. If the constitution means anything, it means, to use its own words (sec. 160), that the chancery court “shall have jurisdiction in such cases to decree possession and to displace possession,” etc. If an express jurisdiction conferred by the constitution on the chancery court is exclusively in that court, then the right to hear and determine Mr. LeBlanc's cause was, and is, in the chancery court only, and not in the circuit court. It looks to the writer that this ought to be the end of this controversy. It cannot be possible that the chancery court, which is affirmatively given jurisdiction to decree possession and to displace possession by the fundamental law, is without power to enforce its own decrees.

Suppose for the moment that the circuit court has jurisdiction ordinarily of ejectment suits, and suppose a plaintiff had recovered a judgment in such an action, but had failed to obtain an order for the issuance of a writ of *habere facias possessionem*, would the chancery court entertain a bill simply to award him possession of the land? Certainly not. And yet the case before us is the exact case, the courts being reversed, of the one supposed. Each court is equally powerful to enforce its own judgments or decrees.

Our statute, § 1626, code 1892, has no application; that re-

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lates to causes of which no court has as yet obtained jurisdiction, and it does not repeal the rule that a court having obtained jurisdiction of a cause has the same to the exclusion of other courts.

The next question is one which must be considered on principle rather than upon Mississippi authority. There are to be found in our reports several cases of ejectment which have been maintained against railroads; but it will be found that only one of them gave room for consideration to the question now presented (*Beck v. L., N. O. & T. R. Co.*, 65 Miss., 172), and it is respectfully submitted that due consideration was not given in that case to the public interests involved—in fact, the rights of the public were not mentioned by the court, if they were considered at all.

The other cases are, naming them in the reverse order of their decision, *L., N. O. & T. R. R. Co. v. Blythe*, 69 Miss., 939, where the court below maintained the action, but it was reversed by this court; *V. & M. R. R. Co. v. Lewis*, 68 Miss., 29, which did not involve a right of way but outlying lands; *V. & M. R. R. Co. v. Lewis*, 67 Miss., 82, where the contention was only about that part of the lands off from the right of way. *Madden v. L., N. O. & T. R. R. Co.*, 66 Miss., 258, does not appear to have involved a right of way for the main line of the road. The case of *L., N. O. & T. R. R. Co. v. Day*, 67 Miss., 227, was not, as erroneously said in *Day v. L., N. O. & T. R. R. Co.*, 69 Miss., 590, an action of ejectment. Remember that the question is, can the railroad company—the Illinois Central Railroad Company, a going public railroad—be ejected from its right of way and main track, a half mile of it? Certainly the courts ought not to do a vain thing. Should the appellant be ejected from its right of way and main track, it would have, or should have at any rate, the right at once to re-enter, and, by proper condemnation proceedings, to regain possession. Under such condition of rights, a *habere facias possessionem* should not issue, even if it be held that the title might be tried in ejectment; and the judgment appealed from is erroneous in awarding such a writ.

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The point I make in this cause, and which does not seem to have received due consideration, if any consideration at all, in previous cases in this court, is this: The rights of the public have intervened, and should have prevented the plaintiff from recovering in this cause, which recovery, if affirmed, will destroy the appellant's line of railroad by wresting possession of a part of it from the company. I do not ask the court to predicate this defense on the rights of the appellant so much as upon considerations of public policy. The rights of the citizen should be, and are often, narrowed, in order that the public welfare may be advanced.

One of the most important of legal maxims is to the effect "that regard shall be had to the public welfare is the highest law." Certainly this highest law is broad enough to prevent a private person from dispossessing a solvent railroad company of a part of its main line, when the company is charged with a service public in its nature and important to the social and commercial interest of the country. Mr. LeBlanc ought not, if his title be perfect both legal and equitable, to be denied full and complete compensation, but the public interest requires that he should be denied possession of the railroad track. Vast interests are involved in the maintenance of railroads. They are charged with a public service, and a public character is so strongly impressed upon them that courts exercise a control over them much beyond that assumed over private individuals. They are recognized as instruments of interstate commerce, and, as such, are within the control of the federal congress. They may exercise rights under the power of eminent domain because of their public character. Towns and cities spring into existence along their lines. Factories, elevators and warehouses are built upon them. The mails of the nation are carried by them. They are common carriers of freight and passengers. All of these interests and more combine in demanding that a citizen, after the possession of the road has involved public interest, shall not be allowed to sever the line and de-

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stroy its efficiency by wresting possession of a part of it from the company. The case does not stand upon the ordinary doctrine of estoppel. The great principle of public policy enters as an important factor, and should control the judgment of the court. Nor is there any hardship upon the landowner in yielding to its dominion. Ample remedies are open to him. He may demand and secure full compensation. If the principle contended for causes suffering, it is better for Mr. LeBlanc to suffer than for the whole public to suffer. But he need not suffer, for compensation full and adequate will always be awarded him by the courts, although possession be denied.

Property in a railroad is peculiar. It has, with propriety, been likened to a chain, which is worthless with one link out. The ejectment of the company from one-half mile of its main track, as done by the judgment appealed from, would largely destroy the value of the entire line not only to the company, but to the state and to the public. Every consideration of public policy requires that Mr. LeBlanc should not be permitted to destroy the vast interest involved by excluding appellant from the possession of a part of the roadbed, thus severing its connection; but he rather should be required, for the sake of the public interest, to seek compensation in an appropriate proceeding. Of course there are cases in which ejectment is an appropriate remedy against railroads, and many such actions have been maintained, and the reports of them are found in the books, but they are mostly cases where the taking of the property in suit did not involve, as it does here, the absolute suspension of the performance of public duty by the company. Those cases, if any, which involved such injury to the public are wrong in principle, and should not be followed. This is not asking that railroads should be favored as litigants, but it simply is asking the enforcement and application of the maxim of enlightened jurisprudence—"that regard should be had to the public welfare is the highest law."

The present case is exceptionably favorable for the applica-

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tion of the maxim. The railroad has been in constant use over the land for more than thirty years, and is now in operation. The plaintiff claims under a tax title for the state and county taxes for the year 1890, and yet the plaintiff's own evidence shows that the taxes thereon for said year were paid by the railroad company. A palpable error of fact made by this court and the counsel in the case, the record of which was offered in evidence by the plaintiff, alone accounts for the anomaly. If ever there was a case for the enforcement of the maxim above referred to, this is the one, the one in which there is the least room to complain of wrong to an individual plaintiff.

The maxim, *salus populi suprema lex*, finds many illustrations in its application wherein private rights are as much, even more, abridged than they would be by its application to this case. A private house may be torn down when necessary to arrest the progress of a fire. *Russell v. Mayor of New York*, 2 Denio, 461. If a highway be out of repair, a passenger may lawfully go over the adjoining lands. *Taylor v. Whitehead*, Dougl., 749; *Dawes v. Hawkins*, 98 E. C. L., 230; *Campbell v. Race*, 7 Cush. (Mass.), 408. At common law, and without a statute, the property of a common carrier, necessary in his public business, could not be seized under execution; this for public convenience. *State v. Rives*, 5 Ired., 297; *Slee v. Bloom*, 19 Johnson, 456-475; *Goodrich v. Burbank*, 12 Allen (Mass.), 459.

J. A. P. Campbell, on same side.

The judgment must be reversed because of the incurable infirmity in the plaintiff's claim of title to the land in the southeast $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 14. If he relies on the judgment of this court confirming his title, his claim fails. The description in that judgment is: "Thirty-eight acres in the southeast $\frac{1}{4}$," etc., and that is undoubtedly void. *Selden v. Coffee*, 55 Miss., 41; *Dingey v. Paxton*, 60 Miss., 1038.

The same rule as to an ambiguity applies to a judgment as

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to a deed or other contract. *Cloughton v. Black*, 24 Miss., 185; Freeman on Judgments, sec. 50, and cases cited.

The conveyances to the plaintiff have the same defective description of the land, and if the superadded words they contain, viz.: "Known as the Carter homestead," etc., constitute a latent ambiguity, it was not removed by any evidence of what the Carter homestead was, therefore it is fatal as a patent ambiguity.

It matters not whether the conveyance of the land by the tax collector was void or not, or whether the evidence admitted to make certain the land sold was properly admitted, or was sufficient for that purpose, for that, if admissible and sufficient, cannot have any influence on the judgment relied on, or on the conveyances to the plaintiff. The statute authorizes evidence of a certain kind in aid of tax collectors' deeds, but stops there, and has no reference or application to conveyances between other parties. Because of the statute, certain descriptions in conveyances by tax collectors may be helped by parol evidence, but the statute applies only to such conveyances, and makes no change as to others, and it is a mistake to suppose that conveyances of land purchased at a sale for taxes may continue to be conveyed by an imperfect description, and that the statute may be invoked to aid them.

The record shows a recovery by the plaintiff by the description of a strip of land of the railroad of the defendant on that land for one-half mile without any reservation of the superstructure, when it is settled that the plaintiff is not entitled to more than the land without the railroad upon it. *L. N. O. & T. R. R. Co. v. Dickson*, 63 Miss., 380.

A fortiori will the rule be applied in this case. It would seem that the recovery should be limited to the land, with stay of execution for such reasonable time as would enable the defendant to remove the structure or exercise the right of eminent domain. The court has full control of its process, and may well so regulate it, for the sake of the public, as to serve

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the public interest and yet preserve the right of a successful plaintiff in ejectment. The court will order restitution where a plaintiff recovering in ejectment takes possession of more than he is entitled to, and will interfere beforehand to restrain him from taking possession of more than he is entitled to. *Adams on Ejectment*, 341, 342.

I presume the court, on application, would stay execution in such case as this, and why not so modify a judgment of recovery as to prevent the necessity of a subsequent application to the court to protect the defendant? Why not administer justice at once according to the nature of the case? This would obviate all objection to maintaining ejectment against a railroad company and do no wrong to a successful plaintiff. I invite attention to *Railway Company v. Adams*, 27 Fla., 443.

Mr. Mayes' point seems to me good. It is this, in effect: Although the decree of this court vacates all claim of the appellant to the land described by numbers, and confirms appellee's claim to it, the court dealt with the land simply as land, and had the fact that the railroad is on it been known to the court, it would have excepted it from the operation of the decree (as it did as to the parcel of land in section 11), and since it now appears that the one hundred feet right of way is on the eastern edge of this land (dealt with heretofore as land), and it is not describable as land or liable to be dealt with as such, it is not embraced in the decree or affected by it, and it will be limited and restrained in its operation to land as such, and so as not to include the right of way, which had ceased to be mere land, and which was not in the contemplation of the court rendering the decree, and therefore, it being now disclosed that the railroad was, and is, on the land described as land merely in the decree, recovery of it should be denied as not embraced by the decree, which is for mere land.

The proposition on which this argument rests is fully established by this court and others. 72 Miss., 669; 68 *Ib.*, 29; 67 *Ib.*, 82; 66 *Ib.*, 518; 58 Ala., 546; 12 Iowa, 531; 37

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Mo., 265; 21 Me., 533; 32 Cal., 499; 7 Neb., 33; 50 Md., 274, and cases cited; 50 Cal., 20; 54 N. H., 406; 35 N. J. L., 40; 48 N. Y., 77; 6 Bush, 127; 47 N. H., 62; 27 Ill., 54; 44 Ill., 248; 99 Mass., 31; 13 Pick., 492; Cooley on Taxation, 400 *et seq.*; Welty on Assessment, 142. The principle is, that land separated by the use or purpose to which it is devoted, is no longer to be described or dealt with as mere land. The right of way was part of the unit composing the railroad and embraced in the commutation tax paid, and this now distinctly appears. As it is certain that this court, on an original bill in equity, would relieve against the accident and mistake which produced the result, I do not see why it may not now administer justice by limiting the decree as proposed.

Mayer & Harris, on same side.

We submit that the court below should have sustained the motion to dismiss, for the reasons stated in the motion. The plaintiff's own proof showed that the chancery court alone had jurisdiction of this particular case. Mr. Thompson has briefed this branch of the case, and we commit the question to his argument. The tax collector's deed and the decree confirming the same do not convey, and cannot convey, the railroad track and right of way, because the property is of such a nature that it is legally impossible for a tax title thereto to be acquired, under any state of circumstances, by an ordinary tax sale. Therefore, whatever might be the generality of the terms describing the land sold and conveyed, either in the deed or in the decree, the railroad track, etc., would not be conveyed thereby, such deed being as to such track void; and, if not void, the track, etc., is exempted therefrom by operation of law.

This sale took place in March, 1891, for the taxes of 1890, and, therefore, it is controlled by the provisions of the code of 1880. Under that code there was a special arrangement which absolutely and entirely displaced the ordinary scheme for the assessment and taxation of railway property and for the col-

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lection of taxes thereon. That scheme is embraced in code, §§ 597-608, inclusive.

Section 603 provides that when the valuation of the property of a railroad shall be ascertained by the state board of assessment, and certified to the auditor of public accounts according to the provisions of the act, it should be the duty of the auditor to ascertain the amount of tax due the state from each railroad company and notify the company of the same, and, also, to certify to the clerk of the chancery court of each county in which the railroad lies the amount to be taxed in the county for county purposes; that the same should be entered upon the collector's book and be collected as provided by law for the collection of their taxes.

Section 604 provides that so far as the taxes assessed in behalf of the state were concerned, if they were not paid the auditor should collect the same by issuing a distress warrant for the amount thereof, directed to any sheriff in the state, whose duty it should be to levy the same upon any real or personal property of the company to be found in his county, and to sell the same as other property of like character is sold for taxes.

By this scheme, then, it must certainly be seen that the state tax on railroad property could be collected, and could be collected only, by an actual warrant, issued out of the auditor's office, placed into the hands of the sheriff, who should make an actual levy, as in the case of execution, and sell the property at a special sale thereon, as in a case of execution sale. The entire scheme of ordinary tax collection was displaced and had no application whatever to the collection of said taxes on railroad property.

So, also, in regard to the county tax. It was impossible legally to sell a railroad on any assessment made by the county authorities. The whole scheme of county assessment was displaced, even as to county taxes, by the sections under consideration. By law it was impossible to fasten upon railroad

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property any liability to the payment of taxes by a county assessment of the lands over which the railroad property ran or through which it ran. Under the code of 1880 it was a legal impossibility for railroad property, as such, to be subject to taxes or subject to sale for taxes, except on assessment made by the state board on the railroad property, distinctively described as such, and certified to the chancery clerk's office, as prescribed. This whole business was outside of and apart from the ordinary scheme of tax collection as set forth in the other provisions of the code. Therefore, we maintain that, although LeBlanc's title to the west $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 14, through which the railroad track and right of way ran, might have been good (as by this court it was adjudicated to be good) under his tax title, yet it was void as to the railroad track and right of way, and the fee under it. This court never has held that these deeds were valid as to such property.

It cannot be said that the decree relied upon by LeBlanc confirms his title to such east $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 14, and, therefore, that it is too late now to agitate the question. Not only is it true that the decree was rendered *diverso intuitu*, and does not pass upon this question at all, but there is still a further reason why it does not have the effect of closing out the question as contended by plaintiff below that it did. That reason is this: The decree confirming a tax title is not of itself an independent source of title. It is confirmatory and evidential in its nature, and has no independent operation or power to create title. The express provision of the code (see § 498) is that the decree shall be held as conclusive evidence that the title to said land was, by the sale, vested in the complainant. It fortifies the tax deed, but it does only that. It does not give to the tax deed a distinct and independent scope and content which it would not have apart from the decree. The effect of the decree is to cut off all questions of regularity of the county assessment and of the ordinary sale, etc., but it does not attach a

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conveying power to the sheriff's deed, whereby that deed transfers property which by law can only be transferred by a deed of entirely a different sort—that is, by a deed containing a distinctive description of the railroad property as must show on its face an assessment and sale of the railroad property as such, made in the manner in which the law required it to be made—all essentially different from the deed produced in this record and confirmed by the court.

In this connection we cite the recent decision of this court in the case of *Owens v. Yazoo & Mississippi Valley Railroad Co.*, in which the court held that an auditor's deed of 1888 was inoperative to convey lands lying outside of the levy, although such lands were expressly described therein by number. The principle is the same. If the auditor's deed could not convey them because they were not such lands as the auditor was authorized to convey, so here neither will the ordinary tax deed of the sheriff convey the railroad property as such, because railroad property as such is not by law authorized to be forfeited and conveyed by such proceeding as the deed in this case (even when fortified and made conclusive as evidence by a decree). Not under any possible state of circumstances. And how much stronger is the reason when the deed of the tax collector does not even purport to convey railroad property as such, and neither does the decree of the court.

If the fact that the property was railroad property (that is to say, a railroad track and right of way) takes it out from the operation of the tax collector's deed to the southeast $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 11, notwithstanding it may be true that the ordinary county assessment of those lands was valid, and the ordinary sale of those lands was valid, and the law was in all respects fully complied with as to those lands, and the ordinary sheriff's sale as to them was in all respects valid and binding, then, for the same reason, the same law takes out the railroad track and right of way from the operation of the same deed, made under the same circumstances, as

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to the east $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 14, and the decree does not, and cannot, import to the tax collector's deed a quality and force to convey other than that which belongs to it by law in those cases where the assessment and sale as made are regular and lawful.

The foregoing propositions are based on the idea that the deed is void as to the railroad track and right of way, and that the decree does not enlarge its operation. It is not necessary, however, to take so radical a position. It is sufficient to say that since the nature of railroad property is such as it is, and since the scheme devised by statute for the taxation of such property is as it is, then the law itself must except such property from the operation of a deed and decree such as this—that is to say, from a deed and decree which conveys ordinary tracts of land by ordinary land descriptions and does not profess to convey railroad tracts and rights of way, and which does not even profess to be based upon the special statutory proceeding devised by law to enforce taxation of that character of property, but, on the contrary, professes only to be the usual and customary proceeding to enforce the payment of taxes on lands of the ordinary sort.

3. The action of the court below was erroneous in rendering such judgment as it did render, because the deeds relied on, and the chancery decree carried, and could carry, only the fee of the lands, and not the railroad's easement over the same, nor its superstructure, because of public policy, said property being affected by a public use. This proposition will be presented fully in the brief filed by Mr. Thompson, and also in that filed by Judge Campbell. We shall not annoy the court by a third argument to the same effect. In order to support their proposition, however, along this line, we call the attention of the court to the following authorities: *Organ v. Railroad*, 39 Am. & Eng. Ry. Cas., 75, 87, 88; *Railroad v. Saltwedge*, 36 *Ib.*, 577, note pp. 579, 580; *Railroad v. Berkey*, 136 Ind., 591; *Foster v. Fowler*, 60 Pa. St., 27; *Wood v. Turnpike Co.*,

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24 Cal., 478; *Railroad v. Parker*, 9 Ga., 393; *Green v. Marks*, 24 Ill., 221; *Gooch v. Gregory*, 65 N. C., 142; *Morgan v. Railroad* (Ind.), 28 N. E. Rep., 548.

Cassedy & Cassedy and *J. H. Price*, for appellee.

This is an appeal from a judgment in an action in ejectment from the circuit court, where LeBlanc had sued the railroad company for possession of certain lands embracing a portion of what is claimed to be a part of the right of way and main line of railroad track. This court, in *LeBlanc v. Illinois Central Railroad Co. et al.*, 72 Miss., 669, adjudicated LeBlanc to be the owner of the land in controversy. On the trial in the court below, the railroad company sought to avoid the effect of the judgment by offering evidence to show that the land was its roadbed and used in the operation of its road at the time of the sale for taxes through which LeBlanc claims title, and that it had paid the privilege tax required, and that, therefore, it was not liable to sale. We conceded that, had this defense been set up in the chancery suit reported in 72 Miss. and here referred to, it would have been a good defense. Subsequently, and after the action of ejectment had been instituted, the railroad company, by motion made before this court, sought to have the decree rendered in accordance with the opinion pronounced in that case changed, on the ground that it did not conform to the opinion of the court. This court, on that motion, held that, in the state of the pleadings and proof, it was proper to have rendered the decree quieting and confirming LeBlanc's title to the land in section 14. In the original case the cross bill averred the validity of the tax title to all the land in section 14 embraced by it. The railroad company answered and denied this. Issue was thus joined upon its validity. The deed was *prima facie* evidence that the sale was valid and passed title to the land. The burden of disproving this was upon the railroad company, which it might have done by proving the same facts offered in evidence of the title on trial of the action of eject-

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ment, but this it neither did or offered to do, though the fact was within its knowledge.

The decision of this court in *Chiles v. Champenois*, 69 Miss., 603, is, if authority were necessary, directly in point here, and is conclusive of the question. It was a bill to remove clouds and quiet title. The answer denied the title, and, complainant offering no proof, the bill was dismissed. It was held that this was a final adjudication of the title against complainant, and was a bar to any subsequent suit asserting such title, the court saying: "Her title was put in issue by the pleadings, and, as to land owned by Cameron, was decided against her because of defect of proof." So in the chancery suit, LeBlanc's title was put in issue by the pleadings, and he made at least *prima facie* proof of it, which entitled him to a decree. The railroad company failed because of a defect of proof. Can it offer it now, when it had it then, and thus avoid the effect of the final decree of this court?

A party failing to assert a claim in a suit in equity in which it might have been litigated with propriety, will not be permitted afterwards to enforce it in a second suit unless his failure to do so in the first case was caused by the fraud of his adversary and was not attributable to his own negligence, is the language of this court in *Stewart v. Stebbins*, 30 Miss., 66. The rule here announced is approved by this court in *Moody v. Harper*, 38 Miss., 599, and *Buford v. Kersey*, 48 Miss., 642. See, also, *Bonney v. Bowman*, 63 Miss., 166, where it was held that a judgment at law, though founded upon a void contract and one against public policy, could not be impeached in equity; that the judgment precluded the defense, for the reason that it might have been interposed in the former suit.

It will not be contended but that the railroad company might with propriety, in the former suit, have set up its claim to the land in section 14, and shown by the proof it offers now that it constituted the roadbed, was used in the operation of its road, and that the commutation tax had been paid before sale, thus

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invalidating LeBlanc's tax title. It will not be claimed that it was prevented from doing this by any fraud of LeBlanc's, but is bound to be admitted on all hands that its failure to do so was attributable to its own negligence.

The abrogation of the well-established principles of law applicable to the subject for the benefit of this litigant, and because of a seeming hardship, will open the doors to litigation and unsettle titles in numberless cases where they have been quieted and confirmed. Any owner to whose lands a tax title has been confirmed, has only to offer some legal defense to the title when sued in ejectment, which, if interposed in the suit to confirm, would have defeated it, and defeat the action.

"A valid judgment for the plaintiff sweeps away every defense that should have been raised against the action, and this, too, for the purposes of every subsequent suit, whether founded on the same or a different cause. Nor will equity relieve the defendant of a judgment on any ground of which he should have availed himself in the action at law."

"The rule is well settled that a former judgment of a court of competent jurisdiction is final and conclusive between the parties not only as to the matter determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected with the subject-matter of the litigation within purview of the original action, either as matter of claim or defense." 21 Am. & Eng. Enc. L., 216-317, and authorities cited in the notes; *Erving v. McNary*, 20 Ohio St., 322; *Covington Bridge Co. v. Sargeant*, 37 Ohio St., 237.

For a full discussion of the doctrine of *res adjudicata*, we refer the court to an extended note to *Lee v. Lee*, 96 Am. Dec., 775. The authorities there quoted and cited are conclusive of the question here. The only other objection to LeBlanc's title is that the tax deed does not sufficiently identify the thirty-eight acres sold. The evidence in the case does identify it in the manner provided by § 3776, code of 1892. The question

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of jurisdiction was raised in argument that the circuit court did not have jurisdiction of an action of ejectment. Section 147 of the constitution removes such a question from the domain of reversible error.

Argued orally by *J. A. P. Campbell* and *Edward Mayes*, for appellant.

WILLING, Sp. J., delivered the opinion of the court.

This is an action of ejectment by the appellee to recover of appellant a tract of about six acres of land, situated in the east $\frac{1}{2}$ of the northwest $\frac{1}{4}$ of section 14, township 1, range 7 east, in the county of Pike. It was shown on the trial that about one-half of a mile of appellant's track was upon the land. The plaintiff in the lower court introduced in evidence, in support of his right to recover, (1) a tax collector's deed of the *locus in quo* executed to L. C. and M. Lenoir, March 2, 1891, by virtue of a sale of the land for the taxes of 1890; (2) deed from L. C. Lenoir to plaintiff, dated August 11, 1892, to the lands, also deed from M. Lenoir to plaintiff to the same, dated April 8, 1892; (3) the record of a chancery suit instituted by the Chicago, St. Louis & New Orleans Railway Company and the Illinois Central Railroad Company against the appellee and others, terminating with the decree of this court in the case of *LeBlanc v. Illinois Central Railroad Co.*, 72 Miss., 669; (4) tax receipts of Sallie Harrell for two acres west side of southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$, section 14, township 1, range 7, for the years 1890 and 1891; (5) deed from A. J. Harrell and wife to Sarah Harrell and another, to the southwest $\frac{1}{4}$ and two acres in west side of southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$ of section 14, township 1, range 7, the land being described by metes and bounds; (6) assessment rolls of Pike county for the years 1883, 1885 and 1889, showing two acres west side of southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$, section 14, township 1, range 7 east, assessed to Sallie Harrell.

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The defendant moved to dismiss the cause, (1) because the circuit court of Pike county had no jurisdiction of an action of ejectment; (2) because the evidence shows that before the bringing of this action the chancery court of Pike county, by plaintiff's cross bill, in the suit of the Chicago, St. Louis & New Orleans Railway Company against plaintiff *et al.*, had acquired exclusive jurisdiction of the subject-matter of this suit, and was exclusively competent to give the relief demanded.

The action of the court in overruling the motion is assigned as error. Counsel for appellant claim that as jurisdiction of certain suits to try title to land and to decree possession, etc., is vested by the constitution in the chancery court, and as section 156 has only given the circuit court jurisdiction of the matters enumerated in said section, that the circuit court has no jurisdiction, under the constitution, of the action of ejectment. Section 160 is as follows: "And, in addition to the jurisdiction heretofore exercised to try title and to cancel deeds and other clouds upon title to real estate, it shall have jurisdiction, in such cases, to decree possession and to displace possession," etc. Section 156 reads: "The circuit court shall have original jurisdiction in all matters, civil and criminal, in this state, not vested by this constitution in some other court." There has always been a well-recognized distinction, under the various constitutions and laws of this state, between "matters civil" and "matters in equity." The constitution of 1869 gave the circuit court jurisdiction in "all matters civil," and provided for the establishment of the chancery court, "with full jurisdiction in all matters of equity." Judge Simrall, in *Bell v. City of West Point*, 51 Miss., 270, in reference to the language used in conferring jurisdiction on the circuit court, says: "Dwelling a moment on the language used, it is broad enough to embrace suits at common law as well as in equity—'all matters civil.' But we know that the purpose was to create a court of common law cognizance, and we therefore give that import to the words. That is plain, from the history of

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the past as well as from subsequent sections of the same article. The sixteenth section provides for the establishment of chancery courts with full jurisdiction in all matters of equity, etc. Reading the two sections together in the light of history, and we have a superior court of original common law jurisdiction, and a court of chancery with full jurisdiction in all matters of equity." The framers of our constitution evidently intended by all "matters civil" to mean matters of common law cognizance. The matters in section 160 of the constitution are matters of equity jurisdiction of which the chancery court had jurisdiction before the adoption of the constitution, in the exercise of their general equity jurisdiction. In those matters it was given jurisdiction to grant full relief to the successful litigant by decreeing to him possession, etc., of the subject-matter of the suit. Under any construction this court is without power, under section 147, to reverse the judgment of the circuit court for want of jurisdiction in that court.

The appellant objected to the introduction of the tax deed and the deeds from L. C. and M. Lenoir to appellee, and the decree confirming his title, on the ground of a patent ambiguity in the description of the land in southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$ of section 14, township 1, range 7, east. The lands in the deed and decree are described as fractional thirty-eight acres in said southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$, assessed to J. J. Carter. It is described in the same way in the deeds from L. C. and M. Lenoir to appellee, except that in those deeds it is further described as having formerly belonged to J. J. Carter, and was part of the Carter homestead. The tax receipts and assessment rolls, and the deed from A. J. Harrell and wife to Sallie Harrell and another, were objected to as being irrelevant.

Under § 491, code 1880, and § 3776 of the present code, the evidence admitted was admissible to identify the land described in the tax deed as being in the southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$ of the section. The roll of 1889 showed that fractional 2 acres in west side of southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$ of said section 14 was as-

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sessed to Sallie Harrell. A description of land as a specified number of acres of the north, south, east, or west part of a particular legal subdivision is good. *Bowers v. Chambers*, 53 Miss., 259; *McCready v. Langsdale*, 58 Miss., 877; *Enochs v. Miller*, 60 Miss., 19.

It was held in *Dodd v. Marx*, 63 Miss., 443, that where the assessment roll furnishes the clue which, when followed by the aid of other testimony, conducts certainly to the land intended, such testimony is admissible. "It is admissible only to apply the description on the roll, which must give the start and suggest the course which, being followed, will point to the lands intended to be assessed." It was shown by the roll that two acres in west side of southeast $\frac{1}{4}$ of northwest $\frac{1}{4}$ was assessed to Sallie Harrell, and one of the deeds showed title in her to that two acres. The objection that the evidence offered was not admissible to remove the ambiguity in the description of the land in the decree is not well taken, as the decree validates the sale of the lands for taxes, in the tax deed, and confirms appellee's title under it, and declares that the deeds from Mrs. Harrell to him vested title in him to the lands described in the tax deed.

It is contended by appellant's counsel (1) that the deeds relied upon by the appellee, and the chancery decree, did not convey, and could not convey, the railroad track or right of way or fee under the same, the property being of such a nature that it is legally impossible for a tax title by tax collector's sale, under the general statutes, to be acquired thereto; (2) that the deeds relied on and the chancery decree carried, and could only carry, the fee in the land, and that neither the railroad's easement over the same nor its superstructure—because of public policy, said property being affected with a public use—were carried.

It is argued, in support of this contention, that under the code of 1880, §§ 597–608, inclusive, there was a special arrangement for the assessment and collection of taxes on railroad property entirely different from the provisions of the code

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for the assessment and collection of taxes on other property, and as this was an ordinary tax sale of the land on which appellant's railroad was situated, the appellee acquired no title either to appellant's right of way or superstructure by virtue of the tax deed or the decree confirming the same.

We will not go into a discussion of the question as to the validity of the tax sale, nor as to whether appellant's right of way over these lands passed by that sale. An easement in lands is an interest in lands. 6 Am. & Eng. Enc. L., 143. The appellee, in the chancery court, by his cross bill, sought not only to have his title established, but to have all clouds removed therefrom, and the decree not only confirms his title, but cancels all interest, claim or privilege the appellant had in or to the same. The decree is conclusive as to the right of way. Did the superstructure the appellant had placed on the land pass by the tax sale to the purchasers? And is the appellant concluded by the decree as to it? This court, and the courts of Michigan, Iowa, Illinois, Minnesota, Wisconsin, Oregon, Pennsylvania, Alabama, Florida, Texas and other states have held that the general rule as to things affixed to the freehold by a trespasser or a person entering tortiously, is not applicable as against a body having the power of eminent domain, and entering without leave and making improvements for the public purpose for which it was created and given such power.

In *Toledo, etc., Ry. Co. v. Dunlap*, 47 Mich., 456, the court says: "The railroad company, whether rightfully or wrongfully, laid this track while in possession, and with purpose entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures inseparably attached to the freehold. Whatever rule might apply in case of abandonment, it is clear that this superstructure was never designed to be incorporated with the soil except for purposes attending the possession, and in proceeding to obtain a legal and permanent right to occupy the

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land for this very purpose, there would be no sense in compelling them to buy their own property."

This case is cited by this court with approval in *Railway Co. v. Dickson*, 63 Miss., 380. Delivering the opinion of the court, Judge Campbell says: "The railroad company was a trespasser in constructing its road upon the land over which it had not acquired the right of way, but it still had the right to acquire the right of way, unaffected by the liability incurred for its trespass. The trespass committed is not involved in the determination of due compensation. The continuing right of the company to secure the right of way in accordance with its charter and the nature of its entry on the land and annexing chattels to the soil, distinguishes the case from that of an ordinary trespasser who affixes chattels to the freehold, and the rule of the common law, established when railroads were unknown, does not apply."

In *Daniels v. Railway Co.*, 35 Ia., 129, where, after a recovery in ejectment by the owner of the land and the railroad company instituted condemnation proceedings, the court held that the value of the improvement put on the land by the railroad company was not to be considered in assessing the damages.

In *Justice v. Railway Co.*, 87 Pa., 28, there had been a judgment in ejectment in favor of the landowner, and the court held that the recovery did not include the chattel put upon the land by the company and the structures they compose. To the same effect are *Jones v. Railway Co.*, 70 Ala., 227, and *Railway Co. v. Adams*, 28 Fla., 631, where the mandate was withheld by the supreme court for a reasonable time, to allow the railroad company to institute condemnation proceedings.

The land in this case was neither assessed nor sold as railroad property, nor for taxes due from the railroad company, but was assessed and sold under the general statutes on the subject of the assessment and sale of lands for taxes. Under our views, the title to the chattels put upon the land by the

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appellant, and the structures under them, was not vested in the appellee, either under the tax sale or the chancery decree, and were not included in his recovery in this case. The judgment of the circuit court is affirmed, but the mandate will be withheld a reasonable time to enable the appellant to institute and prosecute new condemnation proceedings to acquire a right of way over the lands. 7 Am. & Eng. Enc. Pl. & Pr., 705; *Railway Co. v. Adams*, 28 Fla., 631; 51 Am. & Eng. Ry. Cas., 544.

PAUL JEFFRIES v. THE STATE OF MISSISSIPPI.

 1. JUROR. *Disqualification. Opinion of guilt.*

A juror who has formed and expressed the opinion that defendant, charged with murder, "was not justifiable in killing deceased," is incompetent.

 2. SAME. *Examination. Code 1892, § 2355.*

Such a juror, who, on his *votr dire* examination, conceals the facts from the court, is not rendered competent by code 1892, § 2355, and a verdict of guilty found by a jury of which he is a member should be set aside. The juror must make known the facts, and the court must, under the statute, pass upon his competency.

FROM the circuit court of Marshall county.

HON. EUGENE JOHNSON, Judge.

The facts are sufficiently stated in the opinion of the court.

R. T. Fant, for appellant.

The action of the court in regard to the juror, Kilpatrick, was erroneous. The verdict had been just returned into court, and counsel offered to make affidavit as to what they expected to prove by the absent witnesses, Hargus and Hancock, and asked time to procure the attendance of these witnesses, who lived about thirteen miles from the courthouse. The court waived the affidavit and declined to grant counsel time within

74	675
877	787
74	675
79	746
74	675
82	196
74	675
d85	113
74	675
d87	463
74	675
f91	229

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which to procure attendance of the witnesses as requested. Simple justice to the defendant required that his counsel be given at least a reasonable time to get the witnesses.

Argued orally by *R. T. Fant*, for appellant, and by Attorney-general *Wiley N. Nash*, for the state.

STOCKDALE, J., delivered the opinion of the court.

Paul Jeffries was convicted of the murder of Denton Odell, at the August, 1896, term of the Marshall county circuit court, and sentenced to imprisonment for life, and appealed his case to this court.

We have made a thorough and careful examination of the case as presented by the record and have given attention to all the assignments of error, but, in view of its graver importance, will consider the fourth assignment first, which is, that the court erred in refusing to set aside the verdict of the jury and in refusing to grant the defendant a new trial. Upon the hearing of the motion for a new trial, the defendant's counsel stated to the court that he had had subpoenas issued for William Hargus and John Hancock, returnable instanter, to testify on the hearing of the motion for a new trial; that said witnesses resided about thirteen miles from the courthouse, in Marshall county, and that they were then within the jurisdiction of the court; that, by said witnesses, counsel could prove that the juror, J. L. Kilpatrick, had stated, a short time before the trial of this cause "that this case was a very different case from the case of *State v. Moffett* (referring to a case recently tried in Marshall county); that *Moffett* was justifiable in that case, but Jeffries, the defendant in this case, was not justifiable in killing Odell;" that these were the only witnesses by whom this proof could be made; that counsel knew nothing of this statement on the part of said juror until after the rendition of the verdict; that the juror, Kilpatrick, was fully examined on his *voir dire* and stated, under oath, that he knew nothing of the

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facts of the case at bar, had no bias, prejudice or feeling, and could try it impartially. The hearing of the motion for a new trial was in about one hour after the rendition of the verdict, and counsel stated he could not possibly get the said witnesses to the courthouse within that length of time, and asked the court to grant time to get said witnesses, but the court stated that the business of court was now finished, and that he would not hold the court open for that purpose. It was then about 4 o'clock in the afternoon. Counsel for defendant offered to make affidavit as to the facts which he expected to establish by the absent witnesses, or have defendant to do so, but the court stated that he did not consider the matter material, and therefore should not require any affidavit. The court then overruled the motion for a new trial, and sentenced the defendant to imprisonment for life.

The trial judge, in view of the solemn responsibility resting upon him in that last act in the proceedings, where the liberty of a lifetime was involved, must have seriously considered the situation and come to the conclusion that, taking the facts stated by counsel to be true, they were not sufficient to disturb the verdict. We will therefore consider this case as in that attitude—as if an affidavit had been regularly made by the defendant and his counsel in legal form, and filed, setting up in proper shape the facts they could prove, and that the said witnesses had sworn to the utterance by the juror of the words attributed to him, and were uncontradicted.

If Jeffries was not justifiable in killing Odell, he was guilty of murder or manslaughter. He was convicted of murder, and by a juror (so far as his voice went) who had, in effect, pronounced the prisoner guilty before he went into the jury-box to give him a fair and impartial trial.

Section 2355 of the code of 1892 cannot be invoked to cure the evil. That section provides that “any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in a criminal case, notwithstanding

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ing the fact that he has an impression or an opinion as to the guilt or innocence of the accused;" but the statute does not stop there, and no civilized legislature would make a statute stopping there. The balance of the section is: "If it appear to the satisfaction of the court that he has no bias of feeling or prejudice in the case, and no desire to reach any result in it except that to which the evidence may conduct; but any juror shall be excluded if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error."

A juror who has an impression or an opinion is not allowed to say himself, under oath, that he is impartial, and then take his seat, but is to be examined by the court and counsel for defendant and the state, and then it is the impression made on the court that determines his competency. And if he cannot try the case impartially, or if he fails to satisfy the court that he can and will try it impartially, he shall be excluded, says the law.

This juror having an opinion, and a very decided one evidently, concealed it from the court and the prisoner, and gave no opportunity for the court to see whether he was a competent juror. Had he informed the court that he had an opinion that the defendant was not justifiable in killing Odell, and submitted himself to open examination, and had adhered to that opinion to the end of the examination, and informed the court that the prisoner whom he was about to try was not justifiable, no court would have allowed him to sit as a juror to try it. It would be no trial so far as that juror was concerned. This case is practically in that attitude, and the prisoner entitled to whatever benefit grows out of it. *Sam v. State*, 31 Miss., 484.

This doctrine was announced very early in the history of this state—in *Cady v. State*, 4 Miss. (3 How.), 27. In that case a juror, R. J. Patrick, was sworn as a juror and tried the case, and the court say: "The circuit court ought to have awarded a new trial to the defendant; the juror, R. J. Patrick, was not competent to try the prisoner. . . . He had formed and

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expressed an opinion against the prisoner. It will not do to say, in answer to this objection, that his opinion may have been a mere hypothetical one, founded on loose rumor. When examined on his *voir dire* he should have stated the fact, and the court would have been enabled to determine the character of it. He denied that he had expressed an opinion when examined on his *voir dire*, but on a motion for a new trial affidavit was filed stating that the juror had said before the trial that if he should be upon the jury 'he did not think he could clear him (Cady), but should be bound to find him guilty.''' The court closes the case with this sentence: "A due regard to the sanctity of trial by jury, and the constitutional right which has been guaranteed to every man to a trial, in all cases of the kind before the court, by an impartial jury of his country, demanded, as we conceive, a new trial." So, in this case, the juror ought to have stated, on his examination, that he had expressed an opinion, and submitted the question of his competency to the court.

In *Green v. State*, 72 Miss., 522, it is held that § 2355, code of 1892, is not violative of the constitution, but that decision gives no countenance to any idea that a juror can pronounce himself impartial and walk into the jury box with a matured opinion in his mind, but must disclose the fact of such an opinion, or the expression of it, to the searching scrutiny of the court, whose duty it is to see that the opinion of the juror is such that will work no harm to the accused, and unless it so appears to the satisfaction of the court the law requires his exclusion from the jury.

In *Mabry v. The State*, 71 Miss., 716, it was held that a person who "had an opinion and would not say positively that he could try the case as though he had no opinion," was incompetent. It would be too low an estimate of our great lawmaking department to say that it intended to remove or infringe upon, or contemplated the removal or infringement of, the safeguards of the lives and liberties of the people, by authorizing the trial of accused persons by partial or prejudiced jurors, or

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by those who had prejudged the case, but the manifest object of the statute was to avoid the exclusion from juries of men of character, integrity and intelligence, notwithstanding an opinion, provided it appear to the satisfaction of the court that they sufficiently possessed character and honesty to put aside that opinion and try the case as though they had no opinion, and who, by an examination in open court, will convince the court that they will do that. And if the courts perform their duty, there will be no difficulty in securing impartial juries under the present law. But a different condition is presented by the juror, Kilpatrick, in the case at bar. He had come to a conclusion by deliberation, by comparing Jeffries' case with that of Moffet, and concluded that Moffet was justifiable and that Jeffries was not justifiable—evidently a matured opinion. A man of intelligence and accurate expression could hardly employ stronger language to express a fixed opinion of another's guilt than to say he is guilty of an unjustifiable homicide or killing.

The codifiers of the laws of 1892 annotated several decisions of this court as bearing upon § 2355: It is the duty of the court to see that a fair, competent and impartial jury is selected to try every case. *Farriday v. Selser*, 4 How. (Miss.), 506. To accomplish that great object, he may set aside any juror, whether challenged or not. *Lewis v. The State*, 9 Smed. & M., 115; *Williams v. The State*, 32 Miss., 389. And the duty is as incumbent on the court to examine into the sufficiency of objections properly made in proper cases to jurors who have tried cases, as those who are about to try them. *McCarty v. State*, 26 Miss., 299.

All along the history of our jurisprudence are strong and eloquent admonitions by the great jurists of the state to the courts to preserve the juries of the country spotless and pure to the utmost possibility. A superb public sentiment rigidly imposes that duty on all the courts. There is no power invested with the right to take away the life or the liberty of a citizen. The law prescribes certain rules of action and declares

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that their violation shall work the forfeiture of the life or the liberty of the violator, and the only function of the courts in that behalf is to ascertain, by the strict application of the rules of law, whether the accused has, by his own act, forfeited his own life or his liberty and to execute the impartial finding.

It is not worth while to repeat again the oft-repeated ruling of the court that a verdict of a jury embracing one disqualified member cannot be allowed to stand in a case of this sort. There seems to be no room for doubting that the juror, Kilpatrick, was disqualified, and worse than disqualified, if the charges be true. Concealing the fact of his expressed opinion from the court, he caused to be presented to the prisoner a jury with one mind seared by an already matured opinion as to his guilt. We are clearly of opinion that a jury so constituted is not up to the standard required by our laws, and that a due regard for the sanctity of trials involving the life or liberty of citizens, and for the constitutional guarantee of an impartial jury, demands a new trial in this case. Having reached that conclusion on the error of the court below in refusing a new trial, it will not be necessary to pass upon the other assignments.

The judgment of the court below is reversed, a new trial granted and the cause remanded.

 Brief for appellants.

WEILER & HAAS v. MONROE COUNTY.

1. EVIDENCE. *Primary. Secondary.*

The best evidence should be produced, or its absence accounted for, after failure of efforts to secure it, before secondary evidence is admissible.

2. SAME. *Lost writing.*

The party seeking to introduce evidence of the contents of a writing said to be lost or destroyed, must first give some evidence that the original once existed.

3. SIXTEENTH SECTIONS. *Presumption.*

In the absence of sufficient evidence, a lease of a sixteenth section, by school trustees, will not be presumed.

FROM the chancery court of Monroe county.

HON. BAXTER MCFARLAND, Chancellor.

This suit was instituted by Monroe county, under code 1892, ch. 123, seeking the adjudication of the title to a sixteenth section. The amended bill averred that the land was leased, December 26, 1833, by the old school trustees for ninety-nine years, and that defendants held under the lease. The lease was denied by defendants, and they claimed the lands in fee, and set up the twenty-five years statute, code 1892, § 4148, and the ten years statute of limitations. The court below decreed for complainant, fixing the expiration of the lease on December 26, 1932. Defendants appealed.

E. H. Bristow, for appellants.

We insist the chancellor erred in failing to exclude the two or three loose papers of memoranda found in the fly leaves of the old "probate court docket," and offered in evidence to prove the ninety-nine-year lease of the land in controversy,

74	682
870	492
876	496

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charged in the amended bill to have been made December 26, 1833. It was wholly unauthenticated, except as to some uncertain and rather indefinite proof of the handwriting being that of one of the township trustees in 1833, written on four of the fly leaves of the old docket, between the index and the contents of the docket. There is not in the whole record any proof as to where this book was found, except that it certainly was not found among the old papers of the township trustees or their president or treasurer. If these memoranda are of any force, they must be so as records, and we submit that as records they are wholly unauthenticated. 1 Greenl. on Ev., 501; *Phillips v. Cooper*, 50 Miss., 722. Certainly they should be established by at least such evidence as is required to authenticate books of account (*Moody v. Roberts*, 41 Miss., 75); or to establish ancient documents (*Fairly v. Fairly*, 38 Miss., 280; *Nixon v. Porter*, 34 Miss., 687); or to authenticate United States department orders (*Davis v. Freeland*, 32 Miss., 645). But we submit these memoranda were no record at all, and, therefore, not competent as evidence. They were merely private entries made by private parties, and cannot be held to prejudice third persons, under the plainest rules of law. In the first place, on December 26, 1833, there was no law authorizing or requiring any such record to be kept. The act of January 9, 1824 (Hutch. code, 210, 211), only required the treasurer of the township board to "cause to be entered in a book, to be kept for that purpose, all orders of the trustees for the payment of money, and in what manner appropriated," etc.

The act of February 20, 1836 (Hutch. code, 217, 218), cannot apply to the entries in the old docket. These entries purport to have been made three years prior to the act of February, 1836. 1 Greenl. on Ev., 558; *Storm v. Green*, 51 Miss., 103; *Jelks v. Barrett*, 52 Miss., 315.

Complainant's counsel cite the act of February 28, 1838 (Laws 1838, p. 117). But it is conclusive that no lease was made on December 26, 1833, to any of the parties named. The

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legislature, by special enactment, provides that trustees, thereafter to be elected, should make the "proper leasehold titles" to said section to the original lessees, or those claiming under them, "whenever said parties should make full and complete payment therefor," etc. The only legal question necessary to be considered is, whether at any time, prior to the twenty-five years' adverse possession, a legal sale could have been made of the land in fee by the township trustees; and this is answered at once by reference to the act of February 9, 1839 (Hutch. code, 219), providing for either sale or lease of said land, as might be determined by the trustees on the request of two-thirds of the heads of families in the township. After the passage of the act of February 9, 1839, it is well known that most of the sixteenth sections, if not all of them, remaining undisposed of, were sold as unsuitable for school purposes. There is no legal, no sufficient, evidence in the record of any lease. The doctrine of *nullum tempus* does not preclude this claim of the defendants. From the time of the code of 1857, § 402, which went into effect in November, 1857, down to, at least, the code of 1880, where the chapter of limitations was revised and consolidated, is twenty-three years in which the statutes ran against a county; and of this twenty-three years the defendants themselves held the land from 1863 and 1868 to 1880—that is, from twelve to seventeen years, even leaving out the many previous years of adverse holding by their grantor, Burns, and even his grantors. *Jones v. Madison County*, 72 Miss., 808. The act of 1877 (Laws 1877, p. 82), by its terms does not apply to counties.

Gilleylan & Leftwich, for the appellee.

The record, as shown by the old book labeled "Probate Docket," is admissible as testimony. See acts of 1833, compiled acts 1824-38, p. 452. The burden was on defendants to disprove the validity of this old book and show no lease of land was ever made, and, failing therein, makes it presumptive evi-

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dence that the land was leased for ninety-nine years. This book can't be spurious. It is too minute; it speaks for itself. This record and its recitals bind the parties and their privies. It records the official acts of the trustees. All presumptions are entertained in behalf of trustees acting officially. *Davany v. Koon*, 45 Miss., 77; 47 Miss., 181; 48 Miss., 574. But if it should be held that this old book was not a public document, and competent as such, then we submit that, having proved that the same was found in the proper place of deposit, it is competent as an ancient document and admissible under the exception to the rule of hearsay evidence (Greenl. on Ev., secs. 141, 142, 143; also secs. 180, 189, 190, and notes); or, as stated by Mr. Greenleaf, may be introduced as part of the *res gestæ*, and, therefore, admissible as original evidence (*Idem.*, sec. 144).

The act of 1839 only confers the power to sell when the location of the land is unhealthy or otherwise unsuitable for schools, and then a majority of two-thirds of the heads of families of the township to which the same belongs, shall sign a written assent thereto. There is no proof that the locality of this land is unsuitable, unhealthy or otherwise unfit for schools, and not a word of proof showing any assent of the heads of families consenting to a sale. But counsel entirely misconstrues the statute. It does not apply, and was never intended to apply, to anything but the schoolhouse site—not to the entire section. But suppose, finally, that appellants should establish no lease had ever been made. They admit themselves to be in possession of trust property, the inhabitants of the township being the beneficiaries. They must also admit that no demand had ever been made upon them for the possession, and, until so made, their possession was not adverse, but permissive. One beneficiary could not thus get into the possession of the common property, and, before demand made upon him by the others, set up adverse possession. It would be inequitable and unjust, and not permissible in a court of equity. Weiler and

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Haas being themselves beneficiaries in this express trust, they cannot set up the statute of limitations, either against the trustee or their co-beneficiaries, which they are here attempting to do. 27 Am. & Eng. Enc. L., 100, 101, 102, 103, 104, and authorities cited, especially at page 104.

Woods, C. J., delivered the opinion of the court.

Whether any lease to the lands in question ever existed ought to have been shown in accordance with the established rules of evidence. The old book admitted in evidence, entitled "Probate Docket," while it shows that the preliminary steps were taken by the board of trustees to effect a lease in 1833 and 1834, yet fails to show that the lease was completed—fails to show whether final payment was made and the leasehold title conveyed to the lessees, as required by law. The record does not show that any conveyances were produced on the trial, nor any record of them, nor was any effort to produce them or to account for their absence shown, and no foundation was laid for the introduction of secondary evidence.

It is evident that said lease had not been completed as late as February 8, 1838, for an act of the legislature was then passed authorizing and requiring the trustees thereafter to be elected in township 14 south, in range 18 west, in Monroe county, to make to the lessees, or to those lawfully claiming under them, leasehold title to said section 16 of said township whenever full and complete payment should be made therefor. See acts of 1838, p. 117.

Furthermore, it would appear that no conveyance could have ever been made to the land bid off by J. H. Bell, since two of his purchase money notes are produced on trial, and, from the custody in which found, would seem never to have been paid. The record fails to disclose whether that act was complied with and the deeds made. They were not produced, nor was their absence accounted for. It is not impossible that the section here in question might have been sold under the act of the leg-

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islature of February 9, 1839, if the lease was not perfected. See act of 1839, p. 34. The best evidence should be produced, or its absence accounted for, after efforts to secure it had failed, before secondary evidence can be introduced.

The testimony in this case, as we think, is not sufficiently certain nor clear enough to authorize the court to declare that a valid lease of said lands was completed. The decree of the court below is therefore reversed and the cause remanded to be tried according to the established rules of evidence.

Reversed and remanded.

After the delivery of the foregoing opinion the solicitors of the appellee filed a suggestion of error.

WHITFIELD, J., delivered the opinion of the court in response to the suggestion of error.

The omitted testimony, inadvertently left out of the original transcript and now, by consent, therein incorporated, goes only to the diligence of the search, by the attorney of appellee, for the alleged lost lease—not at all to show that such lease ever, in fact, existed. The principle of law controlling on this point is, as stated in 1 Taylor on Evidence (9th ed.), 429, edited by Chamberlayne, this: “First, if an instrument be lost or destroyed, a party who seeks to give secondary evidence of its contents must, to begin with, give some evidence that the original once existed, and then,” etc.

We reversed the case for the absence of satisfactory proof in the peculiar case under the statutes—act of February 8, 1838, and others—and the facts. Of course appellee will be allowed still to make such proof, if it can.

Suggestion overruled.

Statement of the case.

CHESTER CARROLL v. THE STATE OF MISSISSIPPI.

1. SEDUCTION. *Reputation. Chastity. Code 1892, § 1298.*

Actual chastity, and not the mere reputation of chastity, constitutes a female the subject of seduction.

2. SAME. *Evidence.*

It is competent, as one of the elements of proof of actual chastity, to show that the woman had the reputation of being chaste.

3. WITNESS. *Prosecutrix. Contradiction.*

If a question be asked a prosecutrix in seduction whether she had made a certain declaration, and the witness answers, notwithstanding an objection sustained to the question, denying the declaration, and the answer is not excluded, evidence contradicting such answer is admissible.

FROM the circuit court of Webster county.

HON. C. H. CAMPBELL, Judge.

Chester Carroll, appellant, was indicted, tried and convicted under code 1892, § 1298, for the seduction of Agnes Boucher. When the prosecutrix was cross-examined by defendant's attorney, she was asked if she had not stated to Ida Carroll, before her alleged seduction, that "if a girl gets pregnant by a man it was her own fault; that there was plenty of medicine to take which would prevent a girl from becoming pregnant, and that she knew what the medicine was." The district attorney objected to the question, and the court sustained the objection, but the witness, notwithstanding the objection and ruling, answered and said that she had not so stated, adding: "I can look as straight at her as I ever did in my life and tell her so." The defendant introduced Ida Carroll as a witness, and proposed to prove by her that the prosecutrix did make the statement, but the district attorney objected and the

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court sustained the objection, and defendant excepted. A number of witnesses testified that the prosecutrix bore the reputation of chastity before October 22, 1894, the date of the seduction charged in the indictment.

The sixteenth instruction asked by defendant, which was refused by the court, was as follows: "16. The court instructs the jury that an unchaste woman may have a good reputation for virtue and chastity in the neighborhood in which she lives, and proof that she has a good reputation for virtue and chastity in the neighborhood in which she lives does not necessarily establish the fact of her chastity; and if the jury have a reasonable doubt, from all the circumstances and evidence in the case, of the chastity of Agnes Boucher, prior to the twenty-second day of October, 1894, they must find the defendant not guilty."

Critz & Beckett and Leverett, for appellant.

It was error for the court to exclude from the jury the statements made by the prosecutrix to Miss Ida Carroll. If Agnes Boucher said to Ida Carroll: "If a girl gets pregnant by a man, that it was her own fault; that there was plenty of medicine to prevent a girl from becoming pregnant, and that she knew what the medicine was," and proposed to tell Ida Carroll what this medicine was, then every sensible man must have doubt of her chastity.

The reputation of the prosecutrix for chastity was not involved. It was a question as to her personal purity. It is character and not even reputation, which is the priceless jewel of the law's jealous regard. Character is what the girl or woman is; reputation is what others say she is. The former is real and true; the latter may be deceitful and false. *Powell v. State*, 20 So. Rep., 4.

Wiley N. Nash, attorney-general, for the appellee.

It is claimed that it is error for the court to exclude the alleged statements of the prosecutrix to Miss Ida Carroll. Not

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at all. Does it follow that every woman who knows how to prevent conception is a prostitute? Charge 16 was properly refused. It was clearly a charge upon the weight of evidence.

Argued orally by *Wiley N. Nash*, attorney-general, for the state.

WHITFIELD, J., delivered the opinion of the court.

Without now passing upon any other assignments of error than those specially noted, we deem it enough to say that the witness, Miss Ida Carroll, should have been permitted to testify in contradiction of Miss Boucher. The last named witness' testimony on this point was objected to (as to medicine to prevent pregnancy, etc., and its being a girl's own fault if she became pregnant from sexual intercourse), and the objection was sustained, but she answered anyway, denying in the most positive terms that she had made the statement; and the record does not show that this was excluded from the jury, and yet, Miss Ida Carroll was not allowed to testify to the same matter in contradiction. We think this testimony was competent, but we do not think its exclusion reversible error.

But we think the court should have granted the sixteenth instruction asked by the defendant. The charge was eminently proper, in view of the very full testimony as to the reputation for chastity of the woman in the case. It was intended to save the jury from misconception by declaring that the thing which is essential to constitute the woman the subject of seduction is not reputation for chastity, but the fact of actual chastity. It was perfectly competent, as one of the elements of proof of actual chastity, to show that the woman had the reputation of being chaste. We prefer the view that this evidence is competent. *State v. Lockerby* (Minn.), 36 Am. St. Rep., 656. "From the nature of the case," says the court in that case, "general reputation must be regarded as having some relation to actual character, and goes directly to the question of the

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probability of her being chaste." But it remains true that it is actual chastity which is the *sine qua non*, and the charge properly told the jury that proof of reputation only did not, of itself alone, require them to believe actual chastity was established if, from all the circumstances and evidence in the case, they had a reasonable doubt of her actual chastity. Looking to the whole record, we cannot confidently say that the refusal of this instruction did not work harm to the appellant, and hence, for this error, the judgment must be reversed and the cause remanded. *Powell v. State* (Miss.), 20 So. Rep., 4.

HAWLEY S. HEPBURN v. JAMES KINCANNON.

NATIONAL BANK. Receiver. Stockholder.

The receiver of a national bank can recover of a stockholder therein on a note given to the bank for capital stock.

FROM the circuit court of Lee county.

HON. NEWMAN CAYCE, Judge.

This was a suit upon two promissory notes executed by appellee to a national bank. The bank was placed in the hands of a receiver, appellant being appointed receiver. The second, fourth, and amended sixth pleas all averred, in variant forms, that the notes were executed for subscriptions to the capital stock of the bank. The plaintiff demurred to each of these pleas, and the court below overruled the demurrers. Judgment was rendered for defendant, and plaintiff appealed.

J. Q. Robbins, for appellant.

The question is as to the validity of a note given for capital stock of a national bank. Is such a note valid and collectible? Our contention is that such a note is valid and collectible between the parties. The sections of the revised statutes of the

Brief for appellee.

United States upon which the defense is based are sections 5140, 5141, 5142, and 5201. It will be observed that while these sections do by implication forbid transaction of the kind set up in the pleas, there is no penalty of the kind here sought to be set up provided for by any of said sections. *Gold Mining Co. v. First National Bank*, 96 U. S., 640. This case refers to and approves *Harris v. Runnolds*, 12 How. (U. S.), 79, wherein the court held that the whole statute must be looked to; that when negroes were carried into a state and sold, contrary to a statute, that the purchaser would be forced to pay notwithstanding the statute; that the rule was allowed not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy. So the statute of the United States prohibits a national bank from taking mortgages for securities for loans. But when the mortgagor has given the mortgage, even to secure future advantages, he cannot enjoin its foreclosure. *National Bank v. Matthews*, 98 U. S., 621; *National Bank v. Whitney*, 103 U. S., 99. In the case at bar the statute only by implication forbids transactions of this kind, and provides no such penalty as is insisted on. *Fortier v. N. O. Bank*, 112 U. S., 439; *Oates v. National Bank*, 100 U. S., 239; *National Bank v. Case*, 99 U. S., 628; *Logan County Bank v. Townsend*, 139 U. S., 67; *Thompson v. St. Nicholas National Bank*, 146 U. S., 240.

W. L. Clayton, for appellee.

The law governing the case is that of the acts of congress on the subject of national banks, and the question, therefore, arises as to the validity of a note given for the capital stock of such a bank. Is such a note valid and collectible? The law is emphatic that no such associations shall begin and carry on business unless they have a certain amount of capital in cash paid in, and if, at any time, this capital shall be reduced by failure of some shareholder to pay any assessment and the forfeiture of his stock on that account, so that the capital stock shall be

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below that required by the national banking laws, then it must in so many days, be made up to the original amount—the minimum—or the association shall be placed into the hands of a receiver. So, it can be clearly seen that the policy of the law, in relation to these associations, is that the capital stock shall be as is represented—so much cash money. To permit a man to give his note for the capital stock of such associations, would be a fraud upon the law requiring them to have so much capital. If one man can pay, so to speak, in notes for his capital stock, all may do the same, and then we would have an association, under this law, strict as is its provisions, doing business on nothing but the notes of the shareholder of the association. It seems to me that there cannot be any proposition plainer than this, that there cannot be a plain violation of the act of congress on this subject, and then permit the offending association to reap the fruit of such acts. This would be a premium on fraud and a violation of law. *Bank v. Lanier*, 11 Wall., 369; *Bullard v. National Bank*, 18 Wall., 589; *National Bank v. Stewart*, 107 U. S., 676.

WHITFIELD, J., delivered the opinion of the court.

The only question involved in this case is, whether the receiver of a national bank can collect from a stockholder in said bank a note given for capital stock, and that he can is settled by the cases cited by counsel for appellant, in which the reasons are fully stated. See, especially, *National Bank v. Case*, 99 U. S., 628; *Gold Mining Co. v. National Bank*, 96 U. S., 640, and *National Bank v. Matthews*, 98 U. S., 621, and *Logan County Bank v. Townsend*, 139 U. S., 67, a case where, *e converso*, the bank was held liable.

The demurrers to the second, fourth and amended sixth pleas should have been sustained, and are now sustained, the judgment reversed and the cause

Remanded.

Statement of the case.

O. Y. GREGORY v. JOHN T. BROGAN.

1. TAX SALE. *How land offered. Code 1880, § 521.*

Under the code 1880, § 521, it was the duty of the tax collector, in making sale for delinquent taxes of a tract of land constituting one body, assessed and described by United States survey descriptions, to first offer forty acres and sell it for the taxes due on the whole tract if he could; if it failed to bring the taxes due on the whole tract, then he should have added forty acres and offered eighty acres and have sold that for the taxes due on the whole if he could; failing in this, he should have added forty acres and offered one hundred and twenty acres; and so on, adding forty acres at a time, until the whole taxes were bid; and he should have designated each time he made an offer the land offered; and the whole tract should not have been sold until he had offered the parts as above stated and failed to receive a bid covering the taxes on the whole.

2. SAME. *Separate assessments. Same person.*

The above was true, under code 1880, § 521, even where the land constituting one tract was assessed to the same person in separate assessments.

3. SAME. *Wrongful sale.*

A sale of land made in March, 1892, for the taxes of 1891, in violation of code 1880, § 521, was void.

4. TAX TITLE. *Confirmation. Defendant's title.*

The complainant who seeks to confirm a tax title cannot recover because of any defects in the title of one whom he has made a defendant to his suit; he must recover, if at all, on the validity of his own title.

FROM the chancery court of Clay county.

HON. BAXTER MCFARLAND, Chancellor.

Brogan, appellee, filed his bill of complaint against Gregory, appellant, and others, to confirm tax titles to a large body of land. Gregory defended as to a part of the land only. The chancery court confirmed the complainant's titles, as prayed

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76	769
74	894
186	826

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for, to all the land embraced in the suit; defendant, Gregory, alone appealed.

Houston & Reynolds, for appellant.

We submit that the sale was not made as required by § 521, code of 1880. One of the objects of this statute was to prevent the sale of more land than was necessary. *Hodge v. Wilson*, 12 Smed. & M., 498. If sold without designating and describing the particular forty acres offered, and the additional forty acre tracts as they were added, the sale was invalid, because a bidder could not know what the collector was attempting to sell. *Hodge v. Wilson*, *supra*.

Counsel contend that what our statute means by "one tract" is the tract as it is assessed; that the assessment is the final test of it. The statute says: "Until all of the land constituting one tract," not assessed as one tract. It does not say all of the land assessed as one tract, nor does it say all the land constituting one tract on the assessment roll. The statute says "and assessed as the property of the same owner."

Fox & Roan and *J. J. McClellan*, for appellee.

STOCKDALE, J., delivered the opinion of the court.

John T. Brogan filed his bill in the chancery court of Clay county to the May, 1894, term, against G. W. Leigh *et al.*, praying confirmation of tax titles to southeast $\frac{1}{4}$ of southeast $\frac{1}{4}$ of section 11, and southwest $\frac{1}{4}$ of southwest $\frac{1}{4}$ of section 12, and south $\frac{1}{4}$ of north $\frac{1}{4}$ of southwest $\frac{1}{4}$ of section 12, all in township 17, range 5 east, lying in Clay county, Miss., and other lands. Appellant and J. M. Judah, among others, were made defendants, and answered said bill of complaint, denying the right of complainant to confirm his alleged tax titles to lands included in a deed of conveyance from respondent, J. M. Judah, to respondent, O. Y. Gregory (appellant here), on June 16, 1893, by which is conveyed the east $\frac{1}{2}$ of southeast $\frac{1}{4}$ of section 11

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(except nine acres in northwest corner), also one hundred acres on the west side of the southwest quarter of section 12, all in township 17, range 5, east, containing in all one hundred and seventy-one acres, more or less, recorded June 17, 1893. As to these lands, respondent denies that complainant has any valid title thereto, and avers that his pretended tax titles are void, and confer no rights to the said lands.

The cause was tried on the pleadings and proofs, at the May term, 1896, of said court, and decree rendered in vacation, May 30, 1896, granting relief to complainant as prayed, and quieting and confirming in him tax titles to said lands. The proofs contained in the record here show that the south $\frac{1}{4}$ of north $\frac{1}{2}$ of southwest $\frac{1}{4}$ of section 12, township 17, was assessed separately, and the amount of taxes due on it alone run out opposite the description; and that the same is true of the southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of same section; and the same is true of the southeast $\frac{1}{4}$ of the southeast $\frac{1}{4}$ of section 11, same township and range. The description shows that these parcels were contiguous, and the proof shows that they formed and constituted one tract, and were assessed to and as the property of the same owner, G. W. Leigh, and occupied as one farm in 1892. Three separate deeds (one for each parcel of land), were made by the tax collector to the same purchaser (appellee here), each reciting that the parcel therein described "was sold for the taxes due thereon for the year 1891." The list of lands sold to individuals at that sale shows the same thing; and the sheriff of the county, after examining his book in reference to the sale of these lands, testified: "It appears from the book that I sold it separately, each piece for the taxes due thereon."

Counsel for appellees, after stating that the statute had been complied with, call attention to the fact that "three of the deeds were for only forty acres each," and refer us to § 521, code 1880. All proceedings touching the sale of this land were under the code of 1880. There was no forty acres offered for sale to the highest bidder for cash, to see if it would bring the

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amount due on the whole tract, but one forty acres was put up and sold for the taxes due on itself, then another forty, in the same manner, and then a sixty-acre parcel. That mode of sale made it inevitable that the whole tract would be sold for the taxes upon it, no matter how much any one forty acres might have brought. We think the act of the collector in selling the whole tract in that manner, without first having offered it in subdivisions to the highest bidder for cash, and, if the first forty acres failed to bring the taxes due on the whole tract of land, then adding another similar subdivision, and so on, until the requisite amount was produced, or until the whole tract was offered, exhibits such a departure from the scheme provided for the sale of delinquent land, that we think the sale was void, and conferred no title on appellee, so far as the land here in question is concerned. *Griffin v. Ellis*, 63 Miss., 348. It is not the policy nor the disposition of the government to punish the delinquent taxpayer. On the contrary, its policy is to collect the taxes with the least possible injury to the delinquent taxpayer, and, consequently, the collector shall sell the smallest amount of land that will bring the delinquent taxes.

In *Griffin v. Ellis*, *supra*, the tract of land consisted of one hundred acres, belonging to Mrs. Ellis. The collector first offered forty acres, and got no bid. He did not add another, and offer eighty acres, but he offered another forty and got no bid for it, and then offered the remaining twenty acres, and got no bid for it. Having offered each forty separately, and got no bid, he then offered the whole tract, and sold it. It was insisted by counsel in that case for Mrs. Ellis that forty, then eighty, acres should have been offered. Opposing counsel insisted that the same thing was substantially done, and at most it was but an irregularity that did not make the sale invalid; that the legislative intent had been carried out. But this court held the sale void, the opinion being delivered by the learned Chief Justice Cooper. It was the duty of the tax collector in this case to offer forty acres, and get the whole tax

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for it, if he could. Failing in that, he should have added forty and offered eighty, and got the whole tax for that if he could, and so on; but he appeared determined that the whole tract should go for the taxes upon it, and pursued a plan at variance with the plain and peremptory instructions of the statute, that necessarily would produce that result, and with the same injury and injustice to the taxpayer as though the whole tract had been at first exposed.

A void sale is no sale, and no conveyance can be supported by it, and § 525, code of 1880, will not bar the owner from setting up as a defense a total departure from the provisions of law governing and directing the assessment and sale of land for taxes. *Griffin v. Ellis*, *supra*, and cases there cited.

This court has adhered to that doctrine, and held, in *Carlisle v. Good*, 71 Miss., 453, recently, that "the failure of the assessor to file his land assessment roll until the nineteenth day of July, 1889, was fatal to its validity," and the sale was held void for that reason, citing *Griffin v. Ellis*.

It was said in the opinion in *Carlisle v. Good*: "We cannot impute to the lawmaking department a purpose to wrest from the citizen his title to lands by a mere legislative declaration, after an attempt to do so under a void assessment, and a failure in such attempt."

It seems highly improbable that the lawmaking power would require, as it has required, precision in the assessment of property, and in all dealings with assessment roll by the assessor and board of supervisors, and in the manner of sale of lands, evincing an unmistakable purpose to protect the taxpayer from injury or hardship, and then designedly stultify itself by denying him the privilege of invoking the safeguards thrown around him by that power. Irregularities may not avoid the sale, but a total departure from the mode of sale prescribed by law will render the sale void. *Nelson v. Abernathy*, *ante*, p. 164.

The fact that the three parcels of land in controversy were

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separately assessed did not warrant the collector in selling them separately, each for the taxes due on it alone, they constituting one tract and assessed to the same person. Otherwise it would be in the power of the assessor to thwart the purpose of the legislature. The manner of sale was plainly set out by the statute, using the United States survey and divisions, and it is not within the power of the assessor to abrogate the statute by his assessment.

This view being adopted, it will not be necessary to consider the question of notice, or the want of it, arising out of the fact that appellee's deeds were not recorded. Appellant has a good paper title from Judah, and its validity cannot be questioned by appellee in this proceeding. "He challenged consideration of and objections to his title, and asked the court to approve and confirm it, and having failed to show title in himself, it is not material to his rights whether the claim of his adversaries was perfect or not." *Peterson v. Kittredge*, 65 Miss., 38.

The sale of the lands in question in this case being void, appellee cannot show title in himself, and it is immaterial to his rights whether Judah, who conveyed to appellant, had a perfect title or not.

The decree of the court below is reversed and set aside so far as it includes the lands claimed by appellant and any lands in the east $\frac{1}{2}$ of southeast $\frac{1}{4}$ of section 11 (except nine acres in the northwest corner), and one hundred acres of the west side of southwest $\frac{1}{4}$ of section 12, all in township number seventeen, in range number five east, in Clay county, Mississippi.

Syllabus.

POLLOCK & BERNHEIMER ET AL. v. C. R. SYKES,
RECEIVER, ET AL.

1. GENERAL ASSIGNMENT. *Deed of trust. Several instruments. Intent.*

Whether a deed of trust to secure a creditor shall be treated as part of a general assignment, made shortly afterwards by the debtor, is to be determined by the intent and purpose of the grantor in executing the former; time, in such case, being of evidential value only.

2. SAME.

Where a merchant, determined to execute a deed of trust to secure certain creditors, consulted a lawyer for the purpose of so doing, and, being advised by the lawyer that it would necessitate an assignment, nevertheless executed the deed of trust, and shortly afterwards, on same day, made a general assignment, the two deeds are not to be construed as parts of the same transaction, and the deed of trust is not void.

3. SAME. *Tendency of authorities.*

The tendency of recent well-considered authorities, is to recognize the view that preferences were allowed at common law, and that the principles of an insolvent or bankrupt law are not applicable to the making of general assignments.

4. SAME. *Code 1892, ch. 8.*

In case of a general assignment, administered under code 1892, ch. 8, in which the trustee and beneficiaries in a deed of trust are made parties to the suit—the assignment covering the equity of redemption in the property conveyed by the deed of trust—the distinct natures of the trusts are not affected by the fact that the parties to the deed of trust united with the assignee and receiver in a petition to have the receivership extended over the entire property.

5. SAME. *Personal decrees.*

In case of a general assignment, administered under code 1892, ch. 8, creditors who file cross petitions, and establish their debts, are entitled to personal decree against the assignor, even if they fail in the attacks upon the validity of the assignment.

Brief for appellants.

FROM the chancery court of Monroe county.

HON. BAXTER MCFARLAND, Chancellor.

E. Lancitot, an insolvent merchant, conveyed all of his property on the same day by two instruments, the one first actually executed being a deed of trust to secure certain creditors, and the second a general assignment, executed about twenty minutes afterwards, and the general assignment covered the equity of redemption to the property in the deed of trust. The assignee in the assignment filed his petition and bond in the chancery court under code 1892, ch. 8, and a number of creditors filed cross petitions attacking the validity of both conveyances, claiming that they should be construed as evidencing a common purpose and should be treated as if the two were one instrument, and that they were violative of the statute, code 1892, ch. 8, regulating general assignments, and, further, that the debts secured by the deed of trust were usurious. Hurst & Co., creditors, sought by their cross petition to recover, specifically, the goods sold by them to Lancitot.

In the course of the administration by the assignee and receiver he filed a petition asking the court, the trustee and beneficiaries in the deed of trust uniting with him, to extend the receivership over the property conveyed by the deed of trust, but subject to it, in order that the interest of all parties might be promoted by administering the two trusts in one suit, but also asking that in all things he keep separate accounts, etc. No objection to this petition was made by the attaching creditors, and the court granted the prayer of the petition.

Gilleylen & Leftwich, Houston & Reynolds, and Houston & Barron, for appellants.

The record presents this question squarely to this court, whether chapter 8 of the code of 1892 can be furtively evaded by a debtor, powerless in the hands of a bank and its officers, which has been furnishing him money at a usurious rate of in-

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terest, so as to get the benefits of the statute and escape its burdens.

Lancitot, confessedly insolvent (and the answers admit C. R. Sykes and the beneficiaries in the deed of trust knew it), voluntarily offers the First National Bank to secure its indebtedness. He goes to the attorneys of the bank and discusses the preparation of a deed of trust. Before the deed of trust is begun to be prepared, he is blandly told that giving the deed of trust will stop his business. The preparation of the general assignment, by these same attorneys and another, then begins, and it and the deed of trust go hand in hand, *pari passu*, until they culminate in the execution of both at one sitting of the officer who takes the acknowledgments. Both instruments are carried to the chancery clerk's office and filed within a few minutes of each other. We assert, with some confidence, two propositions as touching the validity of the deed of assignment which the learned chancellor sustained: (1) It is void on its face, in that the deed of assignment is a mere auxiliary of the deed of trust and contemporaneously executed; (2) evidence *aliunde* shows that the deed of trust and the assignment together were a preferential disposition of the entire estate of the debtor in the interest of the debts secured by the deed of trust, and that the whole is a palpable evasion of the assignment chapter of the code of 1892; so much so that the courts will not execute it; in other words, the whole constitutes together an attempted assignment which is invalid.

The first proposition is best proven by a confession placed of record by the assignee and trustee, in the deed of trust, themselves. The deed of trust is purely voluntary. There is no extension of the law day for the payment of the notes accrued. There is no consideration. These excellent lawyers, while avoiding Scylla wanted to escape Charybdis. James A Roy, a solvent indorser, had placed his name on the back of these notes secured in the deed of trust, and an extension would release him. That city of refuge was not given up, so that the deed

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of trust is but voluntary. *Dunlap v. Burnett*, 5 Smed. & M., 702; *Perkins v. Swank*, 43 Miss., 349; *Pope v. Pope*, 40 Miss., 516; *Schumpert v. Dillard*, 55 Miss., 348; 15 Am. & Eng. Enc. L., 757.

The assignment is fraudulent on its face, in so far as it requires the assignee to preserve and hold the goods for fifteen days, until the law day of the deed of trust arrives. The deed itself thus palpably hinders and delays creditors in the collection of their debts. The assignee stands over the goods, keeping the general creditors off, until the time when the trustee can come in and take possession. He is a lion in the path of creditors. They cannot attach, they cannot replevy, they cannot levy an execution during that time. But the appellee responds to this attack: "Fifteen days is a very short time, and does no harm to creditors." It does not lie in his mouth to say this. It is the principle of the thing that confronts the court.

This transaction is not like the case of *Sells v. Grocery Co.*, 72 Miss., 590-605, where the assignment was not at first contemplated. The evidence was uncontradicted in that case that, at the time of the execution of the bill of sale and the deed of trust, there was no contemplation of making an assignment. The assignment was first thought of on December 2, 1892, the day on which it was executed, the bill of sale and the deed of trust having been executed on November 30, 1892. Nor is this transaction like *Mayer v. McRae*, 16 S. Rep., p. 875, where the instrument was executed in payment, etc. In this case the deed of trust and the deed of assignment were complementary one of the other. Both were conceived before either was born. They were executed one in support and aid of the other. Both were discussed before either was begun.

The proper construction of code of 1892, ch. 8, we contend, is that a general assignment must be administered by the chancery court. The assignee cannot be made a stakeholder for the trustee for fifteen days, and do nothing in the meantime.

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When the assignor attempts this, as in this case, we think the instrument is invalid on its face. This feature of chapter eight can be no more evaded than the statutes against preferences can be avoided in those states where preferences are invalid. The reasoning of the courts on such statutes, we think, are potent in this case, *mutatis mutandis*. Burrill on Assignments, secs. 93 and 324 *et seq.*; *Perry v. Holden*, 22 Pick. (Mass.), 269 *et seq.*; *Fairbanks v. Haynes*, 23 Pick. (Mass.), 323 and 325; *Perry v. Cutts*, 42 Me., 453; *Pope v. Pope*, 40 Miss., 516; *Dano v. Brener*, 69 Ala., 191; *Krew v. Prindle*, 8 Oreg., 158; *French v. Torrises*, 10 Gratt. (Va.), 513; *Meissey v. Mayer*, 26 Va., 471; *Van Patton v. Marks*, 52 Iowa, 518.

These various instruments are construed as parts of the common design of the debtor, who abandons his entire estate to pay debts, and attempts preferences by indirection. Here the evasion of the law is just as palpable, through the manifest purpose of the assignor to abandon his estate to his creditors through the medium of chapter 8, code 1892, and the chancery court; and at the same time he refuses to allow that court to fully administer the estate, and take entire dominion over it. We invite the court's attention, first, to that line of cases which construes several instruments together as constituting a general assignment, none of which are such standing alone. *White v. Cotschausen*, 129 U. S., 329; *Winner v. Hoyt*, 28 N. W. Rep., 380; *Lorrabee v. Franklin Bank*, 21 S. W. Rep., 747; 29 Cent. Law Jour., 243; *Putney v. Freeselben*, 11 S. E. Rep., 337; *Burnham v. Hoskins*, 44 N. W. Rep., 341; 2 Supreme Court Rep., 367,

These cases go further than is necessary in the case at bar. for here there is a general assignment. There is a second class of cases where there is an assignment without preferences on its face, in states where preferences are prohibited, and, contemporaneously with it, other conveyances making preferences, all of which are construed as one instrument. *Preston v. Spalding*, 10 N. E. Rep., 903; *Farwell v. Nillson*, 24 N. E. Rep., 74; *Perry v. Cutts*, 42 Me., 445; *Hall v. Bancroft*, 30 Ala.,

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193; *Kellogg v. Root*, 23 Fed. Rep., 525; *Van Patton v. Burr*, 3 N. W. Rep., 524; *Field v. Geohegan*, 16 N. E. Rep., 912; *Burnham v. Haskins*, 44 N. W. Rep., 341; 34 N. J. Eq., 478; 12 N. W. Rep., 550.

Clifton & Eckford, on same side.

Does the mortgage and assignment constitute one instrument? E. Lancitot was insolvent and was being pressed by his largest creditor, the bank. He decided to give the bank and a few other creditors a deed of trust on his stock of goods, which constituted almost his entire estate. When he notified his lawyers to prepare the mortgage, who were also the retained counsel of the bank, they told him it would force him out of business, and advised him to make, also, a general assignment. He then decided to make, also, a general assignment, and the two deeds were prepared at the same time by the lawyers, Sykes & Bristow, and both completed before either was executed. The mortgage was executed seven minutes before the assignment, and recorded twenty minutes before the assignment. No extension of time was given on the debts by the bank, but the mortgage matured fifteen days after date, and provided that E. Lancitot should retain possession until the law day, but could not sell any of the goods. The assignment gave C. R. Sykes, the assignee, immediate possession of the goods, referred to the mortgage as a superior lien, and directed that the assignee and receiver should turn over all these goods to the trustee in the mortgage, on the law day of the deed, to pay off the debts.

1. Where an insolvent debtor decides to make a general assignment, and, pursuant to such determination, commences the preparation of the conveyance, having previously determined to secure certain of his creditors by mortgage on a portion of his property, and both the assignment and mortgage are prepared at the same time, and executed at one and the same time, having for their object one common purpose, they constitute one transaction, and are one and the same instrument. Most

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of the states, unlike Mississippi, have statutes prohibiting preferences in general assignments. And while under such statutes it is always fatal to preferences to construe both deeds as one, yet these decisions, under such statutes, throw much light on the question whether these two deeds constitute one transaction or one conveyance. The following cases support and supply the rule as announced above in determining this question: *Selleck & Bush v. Pollock*, 69 Miss., 870; *Hardware v. Implement Co.*, 28 P. R. (Kan.), 171; *Jones v. Kellog*, 33 P. R., 997; *Larrabee v. Franklin Bank*, 21 S. W. Rep., 747; *Falkner v. Lineham*, 55 N. W. Rep., 504; *Bank v. Sands*, 28 P. R., 618-620; *Schillate v. McConnel*, 26 N. E. Rep., 833, 834; *Peed v. Elliot*, 84 N. E. Rep., 319.

2. The following authorities construe the several instruments as one, whenever the insolvent debtor decides to make a general assignment, and subsequently attempts to create preferences by mortgage or other separate conveyance. *Preston v. Spaulding*, 10 N. E. R. (Ind.), 903; *Field v. Geohegan*, 16 N. E. R. (Ind.), 914; *Armstrong v. Holland*, 17 So. R. (Fla.), 366; *Fletcher & Co. v. McMaster*, 49 N. W. R. (Iowa), 1037; *Rochester v. Armour*, 8 So. R. (Ala.), 780; *Borgen v. Varrelman*, 27 N. E. R. (N. Y.), 1065; *Burnham v. Haskins*, 44 N. W. R. (Mich.), 551.

3. Another line of cases goes still further, and construes the several instruments as one when the insolvent debtor decides to part with all his property through conveyances other than general assignment, and creating preferences. *White v. Cotzhausen*, 129 U. S., 329; *Winner v. Hoyt*, 28 N. W. R., 380-383. We think the true and safe rule will be found in the first line of authorities.

This deed of assignment violates our statute, which is mandatory, by taking the property out of the chancery court and turning it over to a stranger and trustee in the mortgage. The cases which held the transaction to be one when the mortgage is executed after the insolvent debtor has commenced the

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preparation of the assignment, do not base their construction on the fact that it violates the statute against preferences, but because of the determination to part with all his property, followed up by commencing the preparation of the assignment; that after the insolvent debtor has decided to make an assignment, and commences it, other conveyances made subsequent or simultaneously will be a part of it.

This scheme is one that chapter 8 of the code of 1892 inhibits. Under this statute the estate is to be administered by the chancery court. The assignment provides that the receiver shall turn over to the trustees in the mortgage the great bulk of the property, lifts it bodily out of the chancery court, and directs that it shall be turned over to a stranger, thereby setting at naught the jurisdiction of the court. This could not be done through any legal process known to the law, much less by the insolvent debtor. *Jeffrey v. McGehee*, 2 Sup. Ct. R., 367. *Bank v. Gilmer*, 22 S. E. R., 5. This direction in the assignment to recognize the trustee's right of possession, not only makes the mortgage a part of the assignment, but was a bold plan to enforce and aid the preference. *Backhaus v. Sleeper*, 27 N. W. R., 413; *Perry v. Helden*, 22 Pick., 269. *Haustenia v. Martin*, 1 Metc., 294. It is not an assignment of the equity of redemption, as contended for by counsel for appellees; for the scheme to make a general assignment had been determined on before the deed of trust was executed or even drafted.

Sykes & Bristow, for appellees.

In states where preferences in assignments are prohibited by law, an insolvent debtor, of course, would not be allowed to "whip the devil around the stump," and accomplish a desired preference by simultaneous deeds—one by way of mortgage, securing one debtor before all others, and the other assigning all his other property for his creditors generally. And these are the states where courts have so decided, being the authori-

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ties cited by counsel below. In Mississippi, the debtor has practically an absolute dominion over his property. *Swiget v. Boyd*, 57 Miss.; *Eldridge v. Simpson*, 58 Miss. In the absence of superior rights of others, by way of lien, etc., a debtor may convey either absolutely or conditionally, by way of mortgage, all his assets to one creditor to the exclusion of all others; or he may secure one fully, by way of mortgage, etc., and assign a remnant to all the others; or confess judgment, etc. All this necessarily results from that dominion which the law of Mississippi gives every man over his own property. *Estes v. Gunter*, 122 U. S., 450, decided on appeal from Mississippi, involving the construction of Mississippi laws, and reversing Judge Hill in an assignment case, a case cited with approval by this court only a short time ago, is exactly like the case at bar in every respect. *Sells v. Grocery Co.*, 72 Miss., 590; *Mayer v. McRae*, 16 So. Rep., 875; *Bamberger v. Schoolfield*, 160 U. S., 149.

Of course, a trust deed made contemporaneously with and in support of the preferences in an assignment would be simply a part of the assignment, and would partake of its invalidity. *Selleck v. Pollock*, 69 Miss., 870. But there is no such state of things in the case at bar. Here we have the simple everyday occurrence of a debtor giving a trust deed to one creditor, on certain specific property, to secure him; and then, desiring to make some disposition of all his other property, on advice of his counsel, he assigns all that to an assignee for the benefit of all his other creditors. Surely, no one will deny that Lancitot had the right to give the trust deed on the stock of goods. Well, did that act deprive him of his absolute dominion over his other property; and was he thus compelled to abandon that altogether?

George C. Paine, on same side.

Lancitot's execution of the deed of trust and the assignment, if free from fraud, will not be avoided because of the fact that they were executed about the same time. He had the right to

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execute these instruments at the time of their respective executions, and to embrace in them the conditions he did. 72 Miss., 590, and authorities referred to in the opinion of the court. The undisputed testimony is that these two instruments were not executed in support of each other, but were separate and distinct instruments. The great array of authorities presented by counsel for appellants from other states, to the effect that the deed of trust and assignment constitute but one instrument, are valueless in this state, because our authorities hold the contrary doctrine, and the reason the other states hold a different rule is because in those states preferences are not allowed.

This court settled this matter in the case of *Sells v. Grocery Co.*, 72 Miss., 606, in which the court says all these matters must be governed by the statutes, jurisprudence and policy of the states where the act is done. So, in the case at bar, it must be construed under our statutes, jurisprudence and policy.

Argued orally by *W. H. Clifton*, for appellants.

WHITFIELD, J., delivered the opinion of the court.

The one thing raised into prominent relief by the record, standing out clear and distinct as a mountain in the landscape, is the purpose of *Lancitot* to secure payment to the creditors named in the trust instrument. It was about that he was exercised. That had been, for some days prior to the execution of either instrument, fully and finally determined upon by him. They had furnished the money upon which he had operated, had been his friends in need, and, naturally, he desired to, and determined to, protect them by preference. And, so far as any fully formed purpose as to the disposition of any of his property was concerned, that purpose was the only one originating with him, as determined upon by him up to the time of the conversations with his attorneys. True, he told *Bowen* some two days before the instruments were executed, that if he made an assignment, he would be protected; but this shows only

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a floating, shadowy thought as to what he might do as to an assignment, and negatives clearly any existence in his mind, then, of a definite determination to do so. But he also told Bowen, in that very conversation, that he had fixed the bank matter. One purpose was fully formed and settled. As to the assignment he had no purpose. The possibility merely that he might do so, had occurred vaguely to him. When his attorneys suggested to him that the execution of the trust deed would necessarily close his business, he, then, for the first time, determined to make the assignment. The trust deed was, in pursuance of his original purpose, executed some thirty minutes before the assignment, though both may have been prepared for execution coetaneously. But the fact that he, at the suggestion of his attorneys, then formed the purpose to execute an assignment, cannot, in reason or principle, affect the other purpose, prior in existence as to time, and different in nature, to execute the trust deed. Both may have been conceived before either was born, but indisputably one was conceived before the other, and one was born before the other, and the twins were as unlike, in essential nature, as Esau and Jacob. The instruments manifest wholly distinct purposes, and the purposes were fully formed and determined upon, in the mind of the grantor, at different times, originated from wholly different motives and considerations, and were not supplementary the one of the other, but have distinct and separate purposes, appropriately manifested by instruments separate and distinct in their nature. The test, in all these cases, must be what was the thought, intent and purpose in the mind of the grantor.

Time is of evidential value only, greater or less according to the particular circumstances of each case, not determinative. *Peed v. Elliott*, 34 N. E. R., 320; *Shillito v. McConnell*, 26 N. E. R., 832. When the time between the execution of the instruments is very short, the inference of identity of transaction, oneness of purpose in making both, is, of course, stronger. But it is true, also, that where attention is directed too exclu-

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sively to mere nearness of time, there is danger of unreasonably straining that inference. To hold with the supreme court of Illinois (*Preston v. Spaulding*, 120 Ill., 208) that, where the mere mental determination has been first reached to make a general assignment, to dispose of all, whatever instruments may be subsequently executed must all be referred to that mental determination, will not help appellants, for no such determination to make a general assignment was first and originally formed by Lancitot. Or to hold with the supreme court of Indiana (*Shillito v. McConnell*, 26 N. E. R., 835) that the Illinois test is unsound, because human tribunals have no practical means of ascertaining just when such mental determination was formed, and hence, that the proof must show, in addition to the fact that the mental determination to make a general assignment was first formed, some act—such as the execution or commencement to execute such general assignment—also furnishes appellants no aid; for again it is to be said, that here no such purpose, first and originally, to make the assignment, existed. See, emphatically upholding this view, *Shillito v. McConnell*, 26 N. E. R., 832. The holding of both these courts, properly understood, is merely that when the determination to make the assignment is first and originally formed, the determination subsequently formed to also make instruments containing preferences, both being thus executed, makes void all the instruments—thus parts clearly of a common scheme, and that scheme one to evade the statute against preferences in a general assignment. But he who first determines to make only a special provision for particular creditors by a trust deed on part only of his property, not then intending to make a general assignment, may never either form the purpose of making such assignment, or in fact make it. There was, in such case, in his mind no common scheme to dispose of all, with the trust deed as part of such scheme. And if afterwards, he—the special provision having been previously fully determined upon—from new considerations suggested to

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him, does so subsequently determine to make such assignment, and does make it, such purpose is clearly not one with the first, but a wholly separate and independent purpose, and when, as here, that first purpose of his, is first completely executed, the special provision is, on this ground, unassailable.

It involves a plain fallacy to argue that whatever Lancitot's first purpose may have been, when his attorneys suggested to him the then necessity of an assignment, he then changed that first purpose, and formed the one new purpose of making both instruments; for the first purpose was not changed, the trust deed being executed in pursuance of the original unchanged purpose, and the assignment was the product of a wholly distinct purpose then first formed.

What was done as to extending the receivership over both trust estates could not alter the essentially distinct natures of the trusts. That was mere administration of two separate trusts, specially prayed to be separately treated. This is so decided, in principle, in *Field v. Geohegan*, 16 N. E. Rep., 912. Much stress is placed on *White v. Cotzhausen*, 129 U. S., 329, by learned counsel for appellants. But, as clearly pointed out in the masterly opinion of Kellam, J., in *Sandwich Mfg. Co. v. Max*, 24 Lawyers' Rep. Annotated, 529, the supreme court of the United States professed in that case only to enforce the law of Illinois as it supposed it to have been announced in *Preston v. Spaulding*, *supra*. And it misconceived that case, as is shown in the case of *Union Bank of Chicago v. Kansas City Bank*, 136 U. S., 223; and in this case it is also shown that some of the circuit judges of the United States had similarly misconceived the decisions of the supreme court of Missouri. See, also, *May v. Tenny*, 148 U. S., 60.

The case of *Sandwich Mfg. Co. v. Max*, *supra*, is remarkable for the vigor and ability with which it emphasizes the doctrine that in those states where preferences are prohibited in general assignments, the prohibition is not of preferences *per se* but of preferences in such instruments, and of the right of

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an insolvent debtor in such states to prefer otherwise, and of the justness of the right of preference. *Selleck v. Pollock*, 69 Miss.

There is observable in the earlier holdings on this subject in states where preferences in general assignments are prohibited, a tendency to construe as one general assignment, in fraud of such statutes, an assignment and any other disposition of property—such as mortgage, trust deed, confession of judgment, etc.—or any such instrument whereby all is disposed of preferentially, or any two or more such instruments. But many recent and well-considered cases point out the fact that preferences were allowed at common law; are now, by statute, in those states expressly allowed to be made, except in general assignments; that the principles of an insolvent or bankrupt law must not be confounded with those to be applied to the making of general assignments; that a single mortgage or trust deed disposing of all is not necessarily a general assignment, within the meaning of these statutes against preferences in general assignments (*Kohn Bros. v. Clement, Morton & Co.*, 12 N. W. Rep., 550), and mark out clearly the distinction between an assignment and a mortgage or trust deed, showing that an assignor intends to divest himself not only of the title to his property, but the control; that an assignment is “made in view of insolvency—that it is the initiation of proceedings for the absolute disposition of the property and distribution of the proceeds;” but that the purpose of a mortgage or trust deed, if it is what it purports to be, is quite different. And hence many cases, in such states, now hold that where there is no assignment, but a mortgage or mortgages, or trust deed or trust deeds made, conveying all, to secure *bona fide* debts, they are not the kind of general assignments meant by these statutes, and that though that is a general assignment, yet if a trust deed or mortgage precede it, in purpose or execution, by never so short a time, the two are not one general assignment, as held in *Shillito v. McConnell*, *supra*. See, in addition, illustrating these propositions, *Kahn Bros. v. Clement, Morton*

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& Co., 12 N. W. Rep., 550; *Sandwich Mfg. Co. v. Mar*, *supra*; *Cutler v. Pollock*, 25 Law. Rep. Anno., 377, at p. 380 specially; *Farvell v. Nilsson et al.*, 24 N. E. Rep., 74; *Leets-Fletcher Co. v. McMaster*, 49 N. W. Rep., 1035. *Estes v. Gunter*, 122 U. S., 450, is in direct support of the views advanced in this opinion.

Of course, where the purpose first formed is to make a general assignment, and, as part of that purpose, to prefer usurious debts by separate instruments, and both were executed in pursuance of such purpose, both are parts of a common scheme in fraud of our chapter 8 of the annotated code, and where usury exists in either, both will be held to constitute a general assignment, and will fall at the attack of one entitled to set up the usury.

Many other grounds of assault upon the assignment are set up by cross petitioners. We cannot notice them seriatim. As to the John E. Hurst & Co. claim, the testimony is insufficient to sustain a rescission for fraudulent representations; and the cross petition of Schloss Bros. and Dunham, Buckley & Co. contains no allegation whatever as to any false and fraudulent representations of Lancitot's financial condition. An amendment for this purpose seems to have been obtained at the hands of the court, but the record fails anywhere to show that the amendment was ever made in this cross petition. The testimony on this subject, under this petition, was therefore properly excluded.

There are other assignments of error, all of which have been carefully considered, but a special notice of which would too much protract this opinion. It is enough to say that we concur, as to all of them save one, throughout, with the learned chancellor—one of the ablest and most accomplished judges who ever adorned the bench in Mississippi. That one relates merely to the failure to enter personal decrees for the cross petitioners, the amounts due all of whom were agreed upon, and some of whom specifically asked personal decrees, and others

Syllabus.

for general relief. The omission to enter these decrees was an inadvertence, manifestly.

The decree is affirmed in all things else, but as to this is reversed, and decrees will be entered here for the amounts agreed on.

EX PARTE JOHN DEVINE.

74	715
891	627

1. EXTRADITION. *Guilt or innocence. Habeas corpus.*

Where relator is arrested for crime committed in another state, upon the warrant of the governor of this state authorizing extradition, the guilt or innocence of relator cannot be inquired into on *habeas corpus* in this state.

2. SAME. *Habeas corpus. Return. Exception. Governor's warrant.*

Upon *habeas corpus* it is not cause of exception to the officer's return, showing that relator is held upon the warrant of the governor of this state for extradition for crime committed in another state, that it does not show an affidavit or indictment emanating from the authorities of the other state. The warrant of the governor is *prima facie* correctly issued, and the return, to be *prima facie* sufficient, need not show anything more.

3. SAME. *Copy of indictment.*

Upon *habeas corpus* in such case, the relator may show, as a fact, if he can, that the warrant for extradition was issued by the governor of this state without having received from the chief executive of the other state a copy of the affidavit or indictment charging the relator with crime in such other state.

4. SAME. *Code 1892, § 2162.*

The power of the executive to extradite fugitives from justice is conferred, and the conditions of its exercise are prescribed, by code 1892, § 2162, and special statutory authority, even when applied to the acts of public officers, must be strictly executed and all prescribed formalities observed.

FROM decision of Chancellor *Claude Pintard*, on *habeas corpus*, heard at Vicksburg.

The opinion states the facts.

Brief for appellant.

Wade R. Young, for appellant.

"The executive warrant, to be sufficient, should show on its face three things: (1) That it has been represented to such executive that the accused stands charged in the demanding state with a certain specified crime, and that he has fled from justice; (2) that a demand has been made upon him for the surrender of such fugitive, pursuant to the constitution and laws of the United States; (3) that said representation and demand was accompanied by an indictment or affidavit, duly certified as authentic by the demanding governor." Am. & Eng. Enc. L., vol. 7, p. 640, 648, note 2; *In re Dow Worn*, 18 Fed. Rep., 698.

The return of the writ of *habeas corpus* herein showed no affidavit, warrant, information or indictment emanating from the authorities of the State of Louisiana, charging the petitioner with any offense against the laws of that state, and the exception should have been sustained and the petitioner discharged. But if the return had been sufficient, the petitioner had an unquestioned right to traverse the return, and to show that there was no copy of an indictment, information, affidavit or warrant emanating from the authorities of the State of Louisiana, charging petitioner with any crime, produced to the governor of the State of Mississippi, when he granted the warrant of extradition. "It must appear, therefore, to the governor of the state to whom such demand is presented, before he can lawfully comply with it, (1) that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand." *Roberts v. Reilly*, 116 U. S., 80; Am. & Eng. Enc. L., vol. 7, p. 638; *Robb v. Conally*, 111 U. S., 625.

The petitioner offered to show that he never committed the crime, as charged in the State of Louisiana, and that the proceedings resulting in his arrest, and the warrant of extradition was instituted and prosecuted for the purpose of compelling him to pay a debt claimed to be due to a resident of Louisiana.

Opinion of the court.

On writ of *habeas corpus* the petitioner has a right to show that he has not committed the crime of embezzlement, and he has a right to show, moreover, the animus of the person who has instituted the proceeding. *Ex parte Slauson*, 73 Fed. Rep., 666.

TERRAL, J., delivered the opinion of the court.

John Devine, being in the custody of William Price, marshal of the city of Vicksburg, upon extradition proceedings instituted by the governor of the State of Louisiana, sued out this writ of *habeas corpus* before Chancellor Pintard, to be discharged therefrom. Price pleaded the executive warrant of the governor of the State of Mississippi, which is set out in his answer, and appears to be in the usual form of such warrants. At the hearing of the writ, the relator excepted to the return, upon the ground that it showed no affidavit or indictment emanating from the authorities of the State of Louisiana, charging him with any crime against the laws of that state. This exception was overruled. Thereupon, the relator offered to traverse the return and to show that the governor of the State of Mississippi, at the time of granting the warrant of extradition, had not received from the governor of Louisiana a copy of any affidavit or indictment charging the relator with a crime. This offer was denied him. The relator then offered to show that he had never committed any crime in the State of Louisiana. This offer was refused him. The relator duly excepted to the several rulings of the chancellor, and now here assigns the same as error.

Upon an examination of a good many authorities, we are of the opinion that the third exception is not maintainable. We find no case in which the guilt or innocence of the relator has been inquired into on *habeas corpus* proceedings. Such practice, we think, would be inconsistent with the laws relating to the extradition of fugitives from justice, and the current of authority is opposed to such inquiry. 2 Moore on Extradition, secs. 612, 632; *Matter of Fetter*, 57 Am. Dec., 395, note;

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Work v. Carrington, 32 Am. Rep., 345 (34 Ohio St., 64); *Hartman v. Aveline*, 30 Am. Rep., 217 (63 Ind., 34).

We also regard the first assignment as untenable. It is a well settled principle of the common law that where acts are of an official nature or require the concurrence of official persons, a presumption arises in favor of their due execution. This is but an application of the maxim *omnia præsumentur rite esse acta*. Broom's Legal Maxim's *944. The principle that the executive warrant is *prima facie* evidence that all the necessary legal prerequisites have been complied with is sustained by many, perhaps by all, the authorities on the subject. *Davis' case*, 122 Mass., 324; *Com. v. Hall*, 9 Gray (Mass.), 262; *Roberts v. Reilly*, 116 U. S. Rep., 80; 9 Am. & Eng. Enc. L., 255, note 4.

The second assignment of error is based upon the refusal of the chancellor to permit the relator to traverse the return, and to show that there was no copy of an indictment or affidavit emanating from the executive of Louisiana charging the petitioner with any crime produced to the governor of Mississippi when he granted the warrant of extradition.

The power of the executive to extradite fugitives from justice is conferred by § 2162, code 1892, and the conditions of its exercise are prescribed by that statute.

In *Learned v. Mathews*, 40 Miss., it was held that every special statutory authority, even when applied to acts of public officers, must be strictly executed and all prescribed formalities observed.

In *Hopkins v. Sandidge*, 31 Miss., 668, the court held that a statute in derogation of the principles of the common law should be strictly construed, and that the courts of most of the states of the union have sanctioned the rule of confining their provisions within the most narrow limits of the language employed. One of the conditions of the issuance of the executive warrant is that the demand of the executive of the state where the crime is charged shall be accompanied with a copy of the affidavit or indictment, certified as authentic by such executive.

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In the petition the relator admits that he is indicted for embezzlement in Madison parish, Louisiana. But this high authority of surrendering citizens of this state to the officers of another state for crime committed in the latter state is to be exercised by the governor upon a copy of the criminal charge duly authenticated—authenticated not by the judge or clerk of the court where the charge is made, not made known to him by the admission of the person charged, but by the executive of the state in which the crime is laid.

Section 2227, code 1892, by necessary implication, authorizes the courts to investigate, by *habeas corpus* proceedings, whether persons charged with an offense committed in any other part of the United States, ought, agreeably to the constitution of the United States or the laws of the state, to be delivered to the executive power of the state where the crime is charged to have been committed.

An almost unbroken chain of authorities, in all the courts of the country, both state and federal, which have looked into and passed upon the power of executives in surrendering alleged fugitives from justice, and the conditions under which this authority can be exercised by them, has settled, as we think, the jurisdiction of the courts in the premises. 2 Moore on Extradition and Interstate Rendition, secs. 628–641, inclusive; 7 Am. & Eng. Enc. L. (title Interstate Extradition), 630 *et seq.*; 28 L. R. A. (note to *Hart's case*), 801.

We think the relator should have been permitted to show by any competent evidence at his command, that the executive warrant was not based upon a copy of an affidavit or indictment for crime, certified to be authentic by the governor of the state of Louisiana.

The judgment of the chancellor is therefore reversed, and the case is remanded for a new trial.

Statement of the case.

WHYTE BEDFORD v. STERLING P. BLYTHE.

1. INDEMNITY. *Pending suit. Offer of compromise.*

An agreement to save harmless another from any judgment that might be rendered against him in a pending suit, does not render the indemnitor liable for a sum offered by him in compromise of the suit, where the offer was refused and the suit determined in favor of the indemnitee.

2. SAME. *Sale of land. Indemnity part of purchase money.*

If land be sold for part cash and in part for indemnity to the vendor from liability in a certain pending suit, and the suit be decided contrary to the expectation of both contracting parties, in favor of the indemnitee, he cannot charge the lands sold to the indemnitor with any sum on account of the indemnity.

FROM the chancery court of DeSoto county.

HON. B. T. KIMBROUGH, Chancellor.

Blythe sold a tract of land to Bedford which was worth something like \$2,200, in consideration of \$1,000 cash and the obligation of Bedford that he would indemnify Blythe from liability in a certain pending suit to which the latter was a defendant. Both parties supposed that the land would be charged in the suit with a lien for about \$1,200, and, pending the suit, Bedford, after his purchase, offered to pay the complainant therein said last mentioned sum by way of compromise. This offer, however, was declined, and the suit proceeded. There were two other suits pending between the parties to the one in respect to which the indemnity was given, and they were in the same court. As the contracting parties expected, the land was, by the court of original jurisdiction, charged with the lien, but for a sum considerably more than was expected, and decrees were at the same time rendered in the other two suits, all being heard at the same time. Appeals were prosecuted in

Brief for appellee.

all of the cases. The supreme court reversed the decree in all of the cases, adjudged that the lands should not be charged with a lien in the suit in respect to which the indemnity was given, and dismissed that suit, but did charge other lands, involved in one of the other cases, with the lien.

After this the vendor, Blythe, brought this suit to charge the land sold by him as for purchase money, the complainant's theory being that defendant expected and was willing to pay \$2,200 for the land; that the sale was really made upon the idea that he would pay that sum; that he had only paid \$1,000, and therefore should pay the balance, especially since complainant's other lands, contrary to expectations of both, had been subjected to the lien which both thought would be imposed upon the land sold. The court below decreed for complainant, and defendant appealed.

J. W. Buchanan and H. D. Minor, for appellant.

Appellant agreed to pay and assume and satisfy the amount of any judgment which may hereafter be rendered in cause No. 2082 (*Hernando Bank v. J. M. Blythe et al.*), and agreed to hold the said Sterling P. Blythe (appellee) harmless from any judgment rendered in said cause in the chancery court of DeSoto county, Miss. In August, 1894, the chancery court gave a decree, in suit No. 2082, to foreclose the deed of trust, for something near \$3,600. From this decree an appeal was taken to the supreme court of the state. The supreme court held that relief should be denied in suit No. 2082. Some time after this appellee made a demand for the sum claimed by him in his bill against the appellant. We insist that, under the contracts and the facts disclosed in the record, there can be no foundation in law or equity for his contention.

R. L. Dabney, for the appellee.

The case stands in this attitude. The appellant expected to pay about \$2,200 for the land—\$1,000 to the appellee and

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\$1,200 to the bank. He says in his deposition that the land was then worth \$2,700. He reserved \$1,200 of the purchase money to discharge what they both thought to be a valid lien upon it. And because the court has shifted the burden from this land to other land, would it be equitable to permit the appellant to retain more than half the purchase price of the land, when appellant admits that it was worth more than he was to give for it, including the amount he offered the bank? I respectfully submit that the learned chancellor reached the right conclusion, and the decree should be affirmed.

Argued orally by *H. D. Minor* and *J. W. Buchanan*, for appellant, and by *R. L. Dabney*, for appellee.

STOCKDALE, J., delivered the opinion of the court.

It appears from the record in this cause that at the February, 1891, term of the chancery court of DeSoto county, a decree was rendered by said court in the case styled *J. M. Blythe et al. v. S. P. Blythe et al.*, ordering the lands of the late G. L. Blythe to be distributed among his five children and heirs. A large plantation, denominated "The Bottom Land," was divided, and each one's share set apart to him or her; and another tract, known as "section 4, township 2, range 8," was sold by order of the court, and proceeds to be divided. At that sale, made on the sixteenth day of March, 1891, by R. R. West, commissioner, Sterling P. and J. M. Blythe became purchasers at the sum of \$5,200, one-half cash and balance to be paid in twelve months. They, not having the money, arranged with J. A. Payne to advance the \$2,600 cash payment, and become their security for the deferred payment, and gave him a trust deed (A. S. Buchanan, trustee) on the lands purchased (section 4), and their respective interests in the "bottom" plantation, to secure their note to him for the cash payment, and against his liability on the deferred payment. Payne was to pay the cash payment (\$2,600) directly to the commissioner for the said

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purchasers, and the commissioner reported that he (Payne) had so paid the said \$2,600. Sterling P. Blythe had previously, in 1890, contracted with J. P. and J. W. Barbee for the sale to them of his interest in said "bottom" plantation for \$4,650, to be paid \$500 cash, \$1,650 when his share was ascertained and designated, and two notes for \$1,250 each, to be given upon confirmation of the partition and deed executed, one to become due January 1, after said confirmation, and the other twelve months thereafter.

At the August term, 1891, the partition of the said bottom plantation was confirmed, and S. P. Blythe executed and delivered to said Barbees a warranty deed to said lands, and they executed the two notes for \$1,250 each, and Sterling P. Blythe indorsed and delivered said notes to A. S. Buchanan, trustee, to be held by him in lieu of the before mentioned deed of trust, as far as S. P. Blythe was concerned. J. A. Payne deposited the note of S. P. and J. M. Blythe to him for \$2,600, and the trust deed securing it, and the said two notes of the Barbees for \$1,250 each, in the Hernando Bank, as collateral security to debts of Payne & Bell to said bank. Payne & Bell having become insolvent and having made an assignment, the Hernando Bank filed its bill in the chancery court of DeSoto county on the twentieth day of January, 1892, against J. W. and J. P. Barbee, to enforce in its own favor the vendor's lien reserved in the two Barbee notes of \$1,250 each, which case was numbered on the docket of said court 2077, to which the defendants (the Barbees) answered, denying ownership of said notes by the bank, and averring ownership in Sterling P. Blythe. S. P. and J. M. Blythe being admitted to defend that suit, answered that the said Payne had not paid the said cash payment of \$2,600 to the commissioner, who had also failed and made an assignment, and that the said \$2,600 note was without consideration and could not be collected, nor said trust deed enforced, and these notes could not be collected. On the twenty-seventh of January, 1892, the Hernando Bank

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filed another bill against Sterling P. and J. M. Blythe and A. S. Buchanan, trustee, etc., to enforce the collection of said \$2,600 note made to Payne by foreclosure of said trust deed. The said defendants Blythe answered said bill, setting up the facts similar to their answer in case 2077. This case was numbered 2082.

In May, 1892, Minnie Taylor, one of the Blythe heirs, filed her bill of complaint against all of her co-heirs and the Hernando Bank and others, setting up that Sterling P. and J. M. Blythe had not paid the cash part of their bid for section 4, made at Commissioner West's sale thereof, and that Payne had not paid it for them, as had long been supposed was done, and no money had been paid her or the other heirs, and prayed for rents and cancellation of the commissioner's deed to Sterling P. and J. M. Blythe.

The Hernando Bank answered said bill, denying the allegations of nonpayment of the \$2,600 to West, the commissioner, and the other defendants admitted all the allegations of the bill, except Sterling P. Blythe, who admitted all the allegations, but stated that the court ordered costs and expenses of partition paid. This cause was numbered 2102. On August 3, 1892, these cases, Nos. 2077 and 2082, were consolidated with No. 2102 (on motion of complainant in the last case) to be heard as one case. On January 12, 1893, the Barbees conveyed by quitclaim deed back to Sterling P. Blythe the lands they had purchased from him, except a small lot, he releasing them from payment of their notes so far as he could. On April 2, 1894, Sterling P. Blythe conveyed the same land by warranty deed to Whyte Bedford for the expressed consideration of \$1,000 cash in hand paid to Sterling P. Blythe, and the said deed contains the following clause, to wit: "And the said Whyte Bedford does hereby assume and agree to pay and satisfy the amount of any judgment which may hereafter be rendered against the said Sterling P. Blythe in the case No. 2082 (*Hernando Bank v. J. M. Blythe et al.*), and agrees to hold the

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said Sterling P. Blythe harmless from any judgment rendered in said case in the chancery court of DeSoto county, State of Mississippi." The three cases above described were tried together on August 9, 1894, and a separate decree rendered in each one, and a final decree rendered in favor of the Hernando Bank in each case (2077 and 2082). Judgment was rendered against the Barbees in 2077 for \$3,098.90, and against Sterling P. and J. M. Blythe in 2082 for \$3,483.26, and decreeing enforcement of the vendor's lien on the Barbee land, and the deed of trust on the shares of Sterling P. and J. M. Blythe in the bottom plantation and on section 4, and that whatever may be collected on the Barbee decree be placed as a credit on the Blythe decree, and that cause No. 2102 be dismissed. Case 2102 was dismissed.

From all those decrees appeals were prosecuted to this court by all the parties adverse to the Hernando Bank, and were all reversed, this court holding that relief should have been denied the Hernando Bank in its bills Nos. 2077 and 2082, and the appellants should have had the relief prayed for in the bill No. 2102 and the several cross bills filed in the several suits. The sale of section 4 was set aside, a resale ordered, and the cause remanded. 17 So. Rep., 4.

When these causes got back to the chancery court of DeSoto county Nos. 2077 and 2082 were regarded as dismissed, and the Hernando Bank taxed with the costs, and there ended case No. 2082. Case No. 2102 was retained for further proceedings. The bill of complaint in this case now at bar does not claim that complainant below (appellee here) was harmed by any judgment rendered in case No. 2082 nor in case No. 2077. They were both decided in his favor in the end. The only obligation incurred in this matter by the appellant was that expressed in the deed from appellee to him, and it is immaterial about when the words "against the said Sterling P. Blythe" were inserted in it. There was no judgment rendered in No. 2082 against anybody, except the bank for costs.

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The claim urged in the bill seems to be, not for any harm that came to complainant therein by another and different suit, but that the amount once offered the bank of \$1,200, in addition to the \$1,000 paid complainant, should now be held to be a part of the purchase money and decreed to complainant below.

The contention that, because appellant once offered the Hernando Bank \$1,200 for a settlement, rather than take the risk of a lawsuit, and that offer being declined by the bank and a judgment of \$3,500 liable to be rendered, and was rendered, against the land and against appellee, which, by his said obligation, appellant was liable to pay to save appellee harmless, and after he had employed lawyers and given a \$7,000 bond, which appellee could not have given, and prosecuted an appeal at an expense of \$200 and more to get rid of said decree, that he must still pay the said amount of \$1,200, deducting the \$200 as part of the purchase money, is so utterly unlikely for a reasonable man to make that it may be disposed of as untenable, and the decree awarding complainant below that particular sum, \$1,200, with interest, indicates that that was the relief granted.

The final decree in the court below is vacated and set aside, and decree here in accordance with this opinion.

Brief for appellee.

DALLAS WILEY v. STATE OF MISSISSIPPI.

74	727
80	213
74	727
87	805

1. CRIMINAL LAW. *Misdemeanor. Aiding or assisting.*

Every person who aids in the commission of a misdemeanor is a principal.

2. SAME. *Selling intoxicating liquors.*

A party to the illegal sale of intoxicating liquors, though he be acting for another in making the sale, is guilty of the illegal sale.

FROM the circuit court of Yalobusha county, second district.

HON. Z. M. STEPHENS, Judge.

The facts are stated in the opinion.

Blount & Stone, for appellant.

The facts proved do not show that Wiley sold the whisky; they rather show, or tend to show, that he acted as the purchaser's agent, to buy whisky for him, or as the agent of an unknown seller. Appellant was not indicted for acting as the purchaser's agent, or for making the sale as the seller's agent. We have a statute applicable to agency in liquor selling, but the indictment is not under such statute.

Surely if appellant acted as the purchaser's agent, he is not guilty under the present indictment; and, if he acted without collusion with a liquor dealer (and the evidence does not tend to show collusion), he is not a liquor dealer himself.

Wiley N. Nash, attorney-general, for appellee.

The testimony of J. P. Bartlett shows that, in the city of Water Valley, shortly after daylight he went to appellant's house, having heard that whisky could be gotten from him. Appellant was not there, but, as witness came back, he met him near the Oak Hall Hotel and asked him if he could let him have a pint of whisky. Dallas said he thought he could. Witness

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then gave him a half dollar, and appellant went and got a pint of whisky and "fetched" it to him. Witness told him he wanted whisky, gave him a half dollar, and appellant was gone but a few minutes when he brought back the whisky to witness in a black bottle. This testimony is undisputed, and makes out a clear case of guilt.

The law is that in misdemeanors there can be no accessories, aiders, or abettors—all are principals. *Williams v. State*, 12 Smed. & M., 58.

STOCKDALE, J., delivered the opinion of the court.

Dallas Wiley was convicted, for unlawfully selling whisky, in the circuit court of Yalobusha county, on the fifteenth day of March, 1896, and sentenced to pay a fine of \$50 and to be imprisoned sixty days, and appealed from that sentence.

It appears from the testimony that one Wm. Bartlett met appellant in Water Valley, and asked if he, Wiley, could get him, Bartlett, some whisky, to which he replied he thought he could. Bartlett gave Wiley fifty cents, and Wiley went off, was gone a few minutes, and came back and delivered to Bartlett a bottle of whisky. These facts show Dallas Wiley to have been a party to the illegal act of selling whisky unlawfully. No matter whether it was his own or another's whisky, all who aid in the commission of a misdemeanor are principals. *Beck v. State*, 69 Miss., 217.

The judgment of the court below is affirmed.

 Brief for appellants and cross appellees.

H. C. CAREY ET AL. v. J. W. FULMER ET AL.

74	729
188	76
188	304

1. EVIDENCE. *Writings. Copy of copy.*

A copy of a copy of letters cannot be used in evidence over objection.

2. DEED OF TRUST. *Trustee. Appointment of substitute.*

Unless specially authorized by the terms of the instrument, a trustee in a deed of trust is unauthorized to appoint another to act in his place.

3. SAME. *Abandonment of trust. Equity jurisdiction.*

If a trustee in a deed of trust abandons the trust, a court of equity may enforce the trust at the suit of the beneficiary.

4. SAME. *Effort to sell for more than was due. Injunction.*

If an effort be made under a deed of trust to sell the property for largely more than the sum due, an injunction may properly be issued.

5. CHANCERY PRACTICE. *Amendment.*

In a suit to enjoin a sale under a deed of trust, on the ground that nothing was due when the deed was executed and that it was obtained by fraud, where defendants filed a cross bill to enforce the deed, it is error not to allow complainants to amend the bill so as to show that the debt claimed by the holder of the deed was made up of usury and other improper charges.

FROM the chancery court of Panola county.

HON. T. B. KIMBROUGH, Chancellor.

The facts are stated in the opinion. Both parties appealed.

P. H. Lowrey, for appellants and cross appellees.

We contend that the evidence shows that the agreement to accept \$5,000 in full for the assets, and in settlement of M. J. Carey's debts, was made, and that it was a valid and binding agreement; if so, then beyond all controversy, there was nothing due defendants when the \$1,200 note was given, and it is with

Brief for appellees and cross appellants.

out consideration and void, as nothing has been advanced on it, all advances since that time having been paid for by M. S. Woodcock. If we are wrong in this contention, still, when all improper, unjust, illegal and extortionate charges and demands are disallowed, there is no balance due to defendants.

The effort by J. D. Fulmer, trustee, to appoint a trustee in his stead, while not a good substitution of the trustee in the deed of trust, was, to say the least of it, an abandonment of the trust by himself, and was ground for an injunction against a foreclosure by him.

The copies of copies of letters attached as exhibits to J. W. Fulmer's deposition should have been struck out on complainant's motion. They, together with the testimony based on and in explanation of them, constitute the bulk of the defense's evidence, and they are clearly incompetent. The rule that copies of written instruments are inadmissible where the original is unaccounted for, and that notice must be given the adverse party to produce papers in his possession, applies as well to letters as to other writings. 1 Greenleaf on Evidence, 15 Ed., 116, and note 6; 1 Taylor on Evidence, p. 476. Besides this objection, they are, or pretend to be, copies of press copies, and if copies are to be offered at all, the press copies, which were in possession of the witness, should have been attached to the deposition. A still further objection is, that one of these letters was not written by the witness, and he claims no personal knowledge of it, of its contents or its transmission to complainants. 1 Taylor on Evidence, p. 476.

St. John Waddell, for appellees and cross appellants.

Complainants by their proposed amendment sought to change the entire ground of their attack on the trust deed and note, and alleged an entirely new state of facts than that originally alleged. The court did not err in refusing to permit them to amend their bill. Neither an amended or supplemental bill, proposing to change the frame and character of the original

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bill, should be allowed. *Clark v. Hulls*, 31 Miss., 520; *Miazza v. Yerger*, 53 Miss., 135.

With the testimony before him, the chancellor in the court below found the facts to be that the note had not been paid, and that it was not void for want of consideration, as claimed in said bill; and we respectfully submit that the decree of the court below, when founded upon a question of disputed facts, will not be disturbed by this court, unless it clearly appear from the record that the decree is rendered against the preponderance of evidence, or under a misconstruction of the law of the case, therefore the decree of the court below, on the direct appeal, should be affirmed. *Davis v. Richardson & May*, 45 Miss., 510; *Apple v. Ganong*, 47 Miss., 196; *Partee v. Bedford*, 51 Miss., 84. It was probably erroneous to make Mrs. Woodcock a defendant to the cross bill filed by defendants with their answer, but she was the only person who could take advantage of that error. For cross appellants we contend that the court below erred in not dissolving the injunction. After the decree the trust deed could only be foreclosed for the balance of the trust deed debt, after crediting thereon the amount in the hands of Fulmer, assignee, to the credit of the Woodcock account, which was adjudged by said decree to go as a payment on the trust deed debt. Under § 572, of the code of 1892, cross appellants were, if the injunction be dissolved, entitled to damages, and we ask that the decree of the court be reversed as to that portion of it which refused to dissolve the injunction, and that the court enter a proper decree here, dissolving the injunction and awarding statutory damages.

Argued orally by *P. E. Lowrey* for appellants and cross appellees, and by *St. John Waddell* for appellees and cross appellants.

STOCKDALE, J., delivered the opinion of the court.

H. C. Carey and M. J. Carey exhibited their bill of complaint in the chancery court of Panola county to the February,

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1895, term of said court, against J. W. Fulmer, J. J. Thornton, and J. D. Fulmer, defendants, to enjoin the sale of their homestead in the town of Courtland, in said county (described in the bill), under a deed of trust given by them to J. D. Fulmer, trustee, for Fulmer, Thornton & Co., of Memphis, to secure a note of the same date (April 19, 1892), for \$1,200, payable by them to Fulmer, Thornton & Co., on January 1, next after date. J. D. Fulmer, trustee of said deed, appointed B. R. Miller trustee in his stead, or attempted to do so, on February 18, 1895; and said property described in the trust deed was advertised to be sold under said deed on the nineteenth day of February, 1895, and plaintiffs enjoined the sale. Complainants allege in their bill, as grounds for injunction, that M. J. Carey, on the sixth day of December, 1889, and for many years prior thereto, was engaged in merchandising, and had dealings for many years with Fulmer, Thornton & Co., commission merchants and cotton factors of Memphis, Tenn., and had become indebted to them in a sum of between \$7,000 and \$8,000. That on the sixth of December, 1889, Fulmer, Thornton & Co. sued out an attachment against M. J. Carey for that debt, and levied it upon her store and assets, and garnisheed her debtors. On January 11, 1890, the stock of goods was sold by the sheriff, by consent of all parties, for \$500, Fulmer, Thornton & Co. becoming the purchasers. That Fulmer, Thornton & Co. further agreed with M. S. Carey, daughter of complainants, who was represented by complainant, H. C. Carey, to take \$5,000 for their debt, and give M. J. Carey a full acquittance of all demands, including a deed of trust on complainants' homestead, giving time to M. S. Carey to make said amount out of said goods and assets, and, in pursuance of that agreement, did turn over to M. S. Carey all of said goods and assets, and all accounts and property belonging to said business. M. S. Carey carried on said business, being represented by her father, H. C. Carey, still doing business with Fulmer, Thornton & Co., they keeping the account in the name

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of M. S. Carey until she married Mr. Woodcock, and then in the name of M. S. Woodcock. That on the nineteenth day of April, 1892, Fulmer, Thornton & Co. claimed that there was due them, under the last mentioned agreement, about \$1,200, and said they would enforce a deed of trust they then held on complainants' homestead, unless complainants would execute a new note and trust deed to secure \$1,200. Complainants did not at that time know whether there was any balance due defendants, having had no itemized account, but upon the most solemn promise of defendants that they would furnish a correct itemized statement, and only hold complainants for the amount found to be due defendants, complainants executed the said note of \$1,200 and said trust deed. That, in point of fact, at the time said note and trust deed were executed, the whole debt of Fulmer, Thornton & Co. had been paid and overpaid, and nothing was due them either by complainants or M. S. Woodcock (Carey), and the said note and trust deed were without consideration and fraudulent and void, and that defendants refuse to make them an itemized account or statement after repeated demands, and they pray for a perpetual injunction.

Defendants answered said bill, denying all its allegations as to the alleged agreement on their part to accept \$5,000 for their debt, but averred that the property was turned over to M. S. Carey upon an agreement that their whole debt (about \$7,000) should be paid, and that it had been reduced by payments, up to April 19, 1892, to \$1,366.62, and that they then had a full settlement with complainants and M. S. Woodcock, who had then a statement made by defendants, and understood it, and agreed to the settlement and to the correctness of that balance, and paid it, by giving the said \$1,200 note, secured by said trust deed, making said note mature January 1, 1893, drawing no interest until maturity, leaving \$166.62 unpaid, to which was added the amount of interest that would have accrued on said \$1,200 (had it drawn interest from date), \$64, making \$130.62, and to pay that the storehouse and lot

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of complainants were conveyed to defendants. The defendants made their answer a cross bill, and prayed for foreclosure of said deed of trust to pay said note, making the said M. S. Woodcock a party defendant thereto, with complainants. The said defendants in the cross bill, including M. S. Woodcock, answer the cross bill, and in it set up matters not contained in the bill of complaint. Defendants (cross complainants) excepted to certain parts of the answer, some of which exceptions were sustained. Complainants (defendants to cross bill) moved the court to allow them to amend their bill of complaint as follows: "Complainants move the court to allow them to amend their original bill by inserting the allegations concerning the giving of the \$2,000 note and deed of trust and the giving of the \$1,200 note and deed of trust, which were by the court struck out of their answer to defendant's cross bill at the last term of the court," which motion was opposed by defendants and disallowed and overruled by the court. Thereupon the cause was tried upon a large amount of conflicting testimony, consisting of depositions and oral testimony delivered in open court, and a decree rendered on February 29, 1896 (the cause having been, by consent, taken under advisement), by which decree the court found that said \$1,200 note was a valid and subsisting indebtedness; that the amount of \$729.13 to the credit of M. S. Woodcock in the hands of Fulmer, Thornton & Co., be credited on said note as a payment thereon; that the balance due on said note to J. D. Fulmer, assignee, is \$731.82, after adding attorney's fees in this case, the injunction retained on account of defendants not having put said credit on the note, but attempting to collect the whole amount thereof, and that defendant, J. D. Fulmer, assignee, pay half the costs of the proceeding; that the assignee, J. D. Fulmer, is entitled to foreclosure, and, if money not paid in sixty days, the property be sold. From this decree H. C. and M. J. Carey appeal to this court, and the defendants (complainants in the cross bill) appeal from that part of the said

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decree refusing to dissolve, but retaining, the injunction and decreeing that defendants pay half the costs of said cause. Appellants assign as errors the following:

1. The court erred in sustaining defendant's exceptions to the answer to the cross bill, and in striking out a part of said answer.

2. The court erred in overruling complainants' motion for leave to amend their original bill.

3. The court erred in refusing to strike out the copies of letters filed as exhibits to the deposition of J. W. Fulmer.

4. The court erred in the findings and orders in the final decree: (a) That the \$1,200 note was a valid and subsisting debt, and that it has not been paid; (b) that the account kept in the name of M. S. Woodcock was, in fact, the account of M. J. Carey; (c) that there was a balance of \$665.32 due defendants on said note; (d) that complainants are liable for defendants' attorney's fee in this case.

5. The court erred in failing to find and decree: (a) That the \$1,200 note is fraudulent and void and without consideration; (b) that the injunction was properly sued out, because of the substitution of Miller, as trustee, in the deed of trust, and because there was no valid and subsisting debt due by complainants to defendants; (c) that the balance in the hands of the defendants belonged to M. S. Woodcock, defendant in the cross bill, and in failing to decree that same be paid to her by J. D. Fulmer, trustee; (d) that an account be taken and stated between the parties, wherein complainants should have been allowed credits for amounts charged to complainants by defendants for their attorney's fees, and for commissions on cotton not shipped, and for usury and interest on amounts paid.

The third assignment of error complains of the action of the court below, in refusing to strike out copies of letters from the depositions of J. W. Fulmer. It is clear that some of said exhibits ought to have been stricken out. Certainly, a "copy of a copy" of letters cannot be used as evidence over objections.

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However, H. C. Carey, the manager of that business through all the years of its existence, testified in the case, at length, in open court, in presence of the chancellor, and he acknowledged writing some of those letters, and thought his son wrote some. Only the substance of his testimony is reported, and it is not clear how far this assignment can legitimately prevail.

There was a large amount of testimony—oral, written, and documentary—before the chancellor. He took the case under advisement, and seems to have considered the whole case carefully, and his judgment is entitled to weight, and we do not discover sufficient cause to disturb his finding on the facts, that the said \$1,200 note of complainants to Fulmer, Thornton & Co., was a valid and subsisting debt. This view disposes of the third assignment, and notes (a) and (c) under fourth assignment, and notes (a) and (b) under fifth assignment. Note (d), under assignment four, is met by the fact that the deed of trust involved in this controversy provides for the payment of attorneys' fees.

The objections raised in fourth assignment, note (b), and in note (c) in fifth assignment, complaining of the action of the court below, in holding that the account of M. S. Woodcock was, in fact, the account of M. J. Carey, and failing to decree that the same should be paid to her, are without practical importance in this case, in view of the fact that Mrs. M. S. Woodcock and the complainants joined in the request (by their answer to the cross bill) or agreement, that if, upon a hearing, it should be made to appear that anything is due to cross complainants on the \$1,200 note, then the said sum to the credit of M. S. Woodcock, or a sufficiency thereof to cover the amount that may be found to be due, be placed to the credit of said note.

The attempt of J. D. Fulmer to appoint one Miller trustee in the trust deed in question, was a void act; and even if such attempt were held to be an abandonment of the trust, the court had power to enforce and foreclose the deed for any sum due on the note, as prayed for in the cross bill.

The first and second assignments, and section (d) of fifth assign-

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ment, may be considered together. We think the complainants ought to have been allowed to amend their bill of complaint so as to allege and prove, if they could, that a portion of the charges against complainants, by Fulmer, Thornton & Co., and which entered into the settlement in the course of the business transaction between the parties, consisted of usury, and compounded interest and attorneys' fees paid, and expenses incurred by Fulmer, Thornton & Co. in the prosecution of the attachment suit against M. J. Carey. If such items entered into the account and formed part of the charges of Fulmer, Thornton & Co. against complainants or M. S. Woodcock, and entered into the settlement, they lessen, to that extent, the amount really due M. S. Woodcock, in the hands of Fulmer, Thornton & Co. Had those items been added—as they should have been—to the amount admitted to be due M. S. Woodcock, in the hands of Fulmer, Thornton & Co., they would have swelled the amount to be credited on the \$1,200 note, and decreased the amount to be paid thereon by complainants.

And it is no matter whether those illegal charges occurred in the transactions of Fulmer, Thornton & Co. with complainants or M. S. Woodcock, seeing that the account of M. S. Woodcock is held to be the account of M. J. Carey, and that all parties agreed that whatever was due M. S. Woodcock should be credited on said note.

We find no error in those parts of the final decree complained of by the cross appeal. Cross complainants undertook to enforce their trust deed for more than twice the amount due them, and they were properly enjoined from that, and the costs properly apportioned.

The action of the court below in overruling complainants' motion for leave to amend their bill of complaint is overruled, and the order thereon vacated and set aside so far as to allow complainants to amend their bill, and leave is here granted to complainants to amend their bill by alleging therein all the allegations contained in the answer of themselves and M. S. Wood-

Statement of the case.

cock to the cross bill concerning charges in the account and transactions of Fulmer, Thornton & Co. with complainants and M. S. Woodcock, of usurious and compound interest and attorney's fees and expenses for prosecuting the said attachment against M. J. Carey. We are satisfied with the final decree in the court below, except as to the matters stated herein, and as to such matters it must be modified according to the findings of the court on the hearing of the cause on the amended bill and pleadings incident thereto.

The final decree in the court below is reversed and vacated to the extent indicated in this opinion, and said decree is affirmed as to matters complained of by the cross appeal.

The cause is remanded for further proceedings in accordance with the views expressed in this opinion.

BILOXI CITY RAILROAD CO. v. ELIZABETH C. MALONEY.

EXEMPLARY DAMAGES. *Highway. Street railroad.*

Exemplary damages are not recoverable by the owner of a lot against a street railroad company for the erection of a structure in a highway so near plaintiff's lot as to obstruct free passage, where no wanton conduct, wilful wrong, malice, oppression or insult is shown, and the structure is seasonably removed.

FROM the circuit court of Harrison county.

HON. H. S. TERRAL, Judge.

Mrs. Maloney, appellee, owned a lot in or near Biloxi, along the rear of which a public road ran, with a passageway from the lot to the highway. The city railroad company, appellant, in the construction of its track, erected a trestle about three feet high and about three feet from appellee's fence, which obstructed free passage from the lot to the highway or street. The suit was for damages by appellee against appellant. There

Brief for appellant.

was no evidence of wanton conduct, wilful wrong, malice, oppression or insult. The opinion contains a further statement of the facts.

Calhoon & Green, for appellant.

It is manifest that the verdict in this case is for vindictive damages. Such damages should not be allowed. The court will promptly distinguish this from that line of cases applying to injuries from the negligent operation of dangerous agencies, such as steam, or the careless handling of fire or explosives, or those accompanied with insult. No case similar to this can be found where punitive damages were allowed. In every instance of such allowance, there is some evidence of insult, malice, oppression, or a wanton disregard of the rights of others. In order to justify the award of punitive damages, there must be more than a mere disregard of private rights; there must be some evil intent. *Wilkinson v. Searcy*, 76 Ala., 176; *Railroad Co. v. Hoeflitch*, 62 Md., 301; *Railroad Co. v. Sourr*, 59 Miss., 456; *Railroad Co. v. Purnell*, 61 Miss., 652; *Forsee v. Railroad Co.*, 63 Miss., 67; *Railroad Co. v. Scanlan*, 63 Miss., 413. The cases in the books where vindictive damages are allowed in property matters for wilfulness, show that the term "wilful" is used in the sense of a wanton disregard of the rights of others, and does not include cases where the act proceeded upon belief of a right. *Storm v. Green*, 51 Miss., 108; *Johnson v. Stone*, 69 Miss., 826; *Railroad Co. v. Green*, 52 Miss., 779.

The injury must be done where the tort feisor knows that he is infringing the rights of others, and not in cases where he merely has reason to suppose the existence of those other rights, and not then where there is no appearance of outrage, insult or oppression, but the mere exercise of what is believed to be the right of the party acting. *Inman v. Ball*, 65 Iowa, 543; *Dow v. Julien*, 32 Kan., 576; *Phelps v. Owens*, 11 Cal., 22; *Warren v. Cole*, 15 Mich., 273. Exemplary damages for

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a tort to property should not be allowed in the absence of insult in the assertion of a supposed right. *Detroit v. Dailey*, 16 Mich., 447; 1 Suth. on Damages, secs. 393-396, 390-392, 399; *Holmes v. Railroad Co.*, 94 N. C., 318. If the trouble is easily remedied, the plaintiff cannot recover so much. In the case at bar, the removal of a gate fifty feet would have prevented all inconvenience whatever, and the appellant offered to do this. Shear. & Red. on Neg., secs. 701, 745, 746, 750, and note 1 to sec. 748. All the authorities concur that the question whether the evidence, if true, would warrant vindictive damages, is for the court.

E. J. Bonners and *D. B. H. Chaffé*, for the appellee.

The erection of a nuisance, specially hurtful to appellee, without warrant of law, and over her express protest, is reckless, wilful and wanton. The court will bear in mind that no warrant is shown by this record for the erection of the trestle or track. The appellant was a wrongdoer acting without authority and with force, over objection. Surely such an act was reckless, wilful and wanton. Wherever there is a "wilful, malicious or reckless tort to person or property," exemplary damages are recoverable. 1 Sutherland on Damages, sec. 391. "If a wrong is done wilfully—that is, if a tort is committed deliberately, recklessly or by wilful negligence, with a present consciousness of invading another's right—an undoubted case is presented for exemplary damages." 1 Sutherland on Damages, sec. 393, p. 846; *Lake Shore Railway v. Rozenzweig*, 113 Pa., 519.

STOCKDALE, J., delivered the opinion of the court.

We have examined the record in this case carefully and thoroughly, and it is evident that a large portion of the verdict was composed of exemplary or punitive damages. Most of the instructions given at the instance of plaintiff were in support of exemplary damages, and one of defendant's instructions was modified in that direction by the court. Much of the

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vigorous argument of appellee's counsel is pointed to sustain appellee's right to punitive damages. From a careful scrutiny of the testimony, and an examination of all the authorities cited by counsel on both sides, taking into view the interview between the general manager of the railroad and Mr. Maloney, the son and agent of the owner of the property claimed to be injured, and who attended to practically all her business, as testified to by Mr. Maloney himself, and as testified to by Mr. Burkland, general manager (and not disputed by Mr. Maloney when reintroduced as a witness), when the work was just begun, and that the work had progressed very far when the letter was written by the agent of the owner that the trestle must be removed, and the interview with the general manager with the owner herself, when "the work was not quite finished." And, in view of all the facts in proof in the case, including the actions of Mr. Burkland, general manager of the railroad, and with whom all the communications and interviews about the matter were had, who seems, so far as the record shows, to have been always polite, evincing a disposition to accommodate, rather than inconvenience people—offered to do anything in his power to avoid injury or inconvenience to the owner or the property of Mrs. Maloney; offered to remove the trestle on the other side of the street to avoid inconvenience or annoyance to her. He removed the trestle from that street before the trial of this cause, and the owner of the property did not testify in the case. In all the actions and efforts of those people (defendants below) to construct that public improvement, there does not appear to have been such wanton conduct or wilful wrongdoing or malicious or insulting conduct as warranted or will sustain a verdict for vindictive damages. Having no guide to enable us to divide the verdict and judgment as to real and punitive damages, we have only the alternative to remand the cause for rehearing before a jury.

The judgment of the court below is reversed and a new trial granted, and the cause remanded.

Statement of the case.

D. D. GODWIN ET AL. v. THOMAS F. DAVIS.

1. INTERNAL IMPROVEMENT LANDS. *Grant to state. Selection.*

Title to the internal improvement lands, granted to the state by act of congress, September 4, 1841, was vested in the state on selection, by its direction, of lands subject to location under the act.

2. SAME. *Irregularities.*

Irregularities in the state's selection of lands under act of congress, September 4, 1841, cannot avail a litigant who does not claim the land under either the United States or this state.

3. SAME. *Sale by state. Irregularities. Laws 1878, p. 218.*

The validity of the state's patent to lands acquired under act of congress, September 4, 1841, which is made under laws of 1878, p. 218, cannot be questioned by one who does not claim under the United States or this state.

FROM the chancery court of Tallahatchie county.

HON. A. H. LONGINO, Chancellor.

The appellee, Davis, began this suit in the chancery court against the appellants, Godwin and others, to cancel the claims of defendants to the lands in controversy, and to remove them from the possession thereof. The lands were a part of the internal improvement lands, donated to the state by act of congress, approved September 4, 1841, and complainant purchased from the state and obtained its patent, under laws of Mississippi 1878, p. 218, which authorized the sale of the lands at fifty cents per acre, while the act of congress provided that they should not be sold by the state for less than one dollar and twenty-five cents per acre. The defendants, by their answers, claimed ownership of the lands, but did not offer evidence of any title in themselves.

Brief for appellants.

E. D. Dinkins, for appellants.

The complainant must rely on the strength of his own title, and not on the weakness of that of his adversary. He must have a "perfect legal or a perfect equitable title." *Boyd v. Thornton*, 13 Smed. & M., 338; *Toulmin v. Heidleberg*, 32 Miss., 268; *Jayne v. Boisgerard*, 39 Miss., 736; *Huntington v. Allen*, 46 Miss., 654; *Handy v. Newman*, 51 Miss., 166; *Griffin v. Harrison*, 52 Miss., 824.

The patent appears on its face to be invalid, as the ninth section of the act of congress, September 4, 1841 (code of 1857, 689), which gave to the State of Mississippi the right it had in said land, provides "that the lands herein granted to the states above named shall not be disposed of at a price less than \$1.25 per acre until otherwise authorized by law of the United States. Now, by reference to said patent, it will be seen that it was issued under an act of the legislature of the State of Mississippi, approved March 4, 1878, which reduced the price of the lands known as "The Internal Improvement Lands," granted by said act of congress, from the \$1.25 per acre to fifty cents per acre. This reduction was not "authorized by law of the United States," and, if the legislature acted without authority, then any patent issued under said act must be void.

The United States constitution, art. 4, sec. 3, provides that "congress shall have power to dispose of and provide all needful rules and regulations respecting the territory of the United States," and in passing the act of September 4, 1841, congress merely exercised a constitutional right.

To hold that the patent in this case passes the title to the appellee, will be to say that, not congress, but the State of Mississippi has power to dispose of the public lands and of prescribing the rules and regulations concerning that disposition, which would be to say that the laws of the State of Mississippi are paramount to the laws of the United States in relation to a subject confided by the constitution to congress alone.

Wilcox v. Jackson, 13 Peters, 498.

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Should it be urged that this is an unwarranted collateral attack upon a patent, which is the highest evidence of title, I answer in the words of the law: "The patent for land must be executed strictly in the manner prescribed by statute. Every integral part of its execution is essential to its perfection, and before it can operate as a grant, the formalities of the law prescribed for its execution must be complied with." 19 Am. & Eng. Enc. L., 352.

Calvin Perkins, for the appellee.

The case of *Van Wyck v. Knevals*, 106 U. S., 360-370, is conclusive of the question that no one but the United States, through judicial proceedings or by act of congress, can question the validity of the patent which the State of Mississippi issued to the plaintiff. See, also, *St. Louis, etc., v. McGee*, 115 U. S., 469; *Schulenberg v. Harriman*, 21 Wall., 44; *Schoo v. Harriman*, 21 Wall., 264.

WHITFIELD, J., delivered the opinion of the court.

The eighth section of the act of congress of 1841 did not itself vest the title *in præsenti* in the state. *Foley v. Harrison*, 15 How. (U. S.), 434; *Patterson v. Tatum*, 3 Sawyer's Cir. Ct. Rep., 165. But "when [as said in the last case cited, approving *Doll v. Meador*, 16 Cal., 320] the selection and location were once made, pursuant to the state's directions, of lands not reserved, but subject to location, the general gift of the quantity becomes a particular gift of the specific lands located, vesting in the state a perfect and absolute title to the same; and that title passed by her patent." *Van Wyck v. Knevals*, 106 U. S., 360, controls this case. The same learned judge (Field) delivered the opinions in all three of these cases—*Van Wyck v. Knevals*, *Patterson v. Tatum*, and *Doll v. Meador*.

Foley v. Harrison does not support the contention of counsel for appellant. In that case the location of the land was never approved by the proper federal authorities. On the contrary,

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a special tribunal, with judicial power, created by act of congress of August 3, 1846, composed of the secretary of the treasury, the attorney-general, and the commissioner of the general land office, expressly disapproved the location, and the court said, at p. 448, that "decision was final within the law."

Patterson v. Tatum is wholly unlike the case at bar. There the selection and location was of land expressly reserved, by the proper federal authority, from sale, and hence not subject to location. Pages 166, 170. This case is like *Doll v. Meador*, distinguished and reaffirmed in *Patterson v. Tatum*. In *Doll v. Meador*, as here, the party seeking to set up, in a private litigation between himself and his adversary, the invalidity of the state's patent, based on the selection and location, was a "trespasser without title, not in privity with a common or paramount source of title." And the court said: "There, in *Doll v. Meador*, the controversy was between the holder of a patent of the state and a trespasser without title, and it was held that the latter, not being in privity with a common or paramount source of title, was in no position to question the validity of the patent or the action of the officers of the state by whom the lands were selected." Page 172, and again at pages 174, 175. "The point here is as to the status of the party who can raise any question as to its validity, when it is regular on its face. Nor do we question the proposition that the defendant might have disputed the evidence of title furnished by the patent, by showing that the land in question was not included in the act of congress, or was within the exceptions contained in the act of this state. We only annex to the proposition the qualification that, to do this, he must first have brought himself in some privity with the common source of title. If he was a mere intruder, not possessing any claim of title, either from the state or general government, he would not be in a position to question the regularity and correctness of the action of the officers of the state in the selection of the lands in the issuance of the patents." It must be remembered

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that *Doll v. Meador* and *Patterson v. Tatum* are cases arising on the construction of this very section 8 of the said act of congress of 1841.

In *Van Wyck v. Knevals*, *supra*, it was said, p. 369: "A third party cannot take upon himself to enforce conditions attached to the grant when the government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the government has been treated with respect to the property."

In this case the selection and location were duly made, under the act of the state legislature of February 26, 1842, duly reported December 19, 1844, submitted to the secretary of the treasury November 20, 1847, approved November 22, 1847, by the secretary of the treasury, and that approval was certified to the governor of the state, and a copy of the list of selected and located lands sent him November 30, 1847. Under the authorities cited, the title was thus perfected in the state; and, really, the true point of contention, properly understood, is not so much that such title was not so vested, but that the state could not thereafter sell the lands for less than one dollar and twenty-five cents an acre (sec. 9, act of 1841 of congress, code of 1857, p. 689), without a law of the United States authorizing it to do so, and that, hence, the act of the legislature of Mississippi of March 4, 1878, fixing fifty cents an acre was a nullity. It is not so much a complaint that title had not vested in the state, as that, having done so, the state could convey no title, under the act of 1878. But neither the state nor the general government is here complaining, and this defense is not available, as shown, to parties situated as are the appellants.

Affirmed.

Brief for appellant.

HENRY STOVALL ET AL. v. JOHN M. JUDAH.

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86 6161. LOST DEED. *Evidence.*

Evidence to establish an alleged lost deed examined and adjudged insufficient.

2. CONSTRUCTIVE NOTICE. *Deed. Trust deed. Record.*

Where a purchaser of land fails to record his deed, but the vendor duly records a deed of trust, given by the purchaser to secure the purchase money, the record of the latter is constructive notice to the trustee and beneficiaries therein of the rights of the purchaser.

3. SAME. *Occupation. Unrecorded deed.*

The open, exclusive, and continuous occupation of land, under an unrecorded deed, is constructive notice to creditors and subsequent purchasers of the occupant's rights.

FROM the chancery court of Chickasaw county, first district.
HON. BAXTER MCFARLAND, Chancellor.

Suit by Judah, appellee, against Stovall and others, to confirm title to lands. The decree of the chancery court was in complainants' favor; the defendants appeal. The facts are stated in the opinion.

Stovall & Williams, for appellant.

If the court holds, as we contend it must, that the evidence is insufficient to show a reconveyance, then, was the Dundee Mortgage Company an innocent incumbrancer, and John M. Judah an innocent *bona fide* purchaser? We think not. Henry Stovall and his family had been in possession of this land, occupying and cultivating it, for years, and it was a notorious fact in that community that this land belonged to Henry Stovall, and it was known and called the "Stovall Place," taking its name from said Henry Stovall.

Brief for appellee.

The record of deeds of the county showed a trust deed on the land from Henry Stovall to D. T. Payne. The land assessment roll of this county, for 1883 to 1887, show said land assessed to Henry Stovall. The tax collector's stubs show that Henry Stovall paid taxes on the land for these years. The records of the circuit court of the county show an attachment suit for rent of the land against Henry Stovall, in favor of the executor of Payne's estate, for the year 1887, decided for Stovall. The records of M. A. Bean, a justice of the peace for said county, show an unlawful entry and detainer suit, for the possession of the land, against Henry Stovall, and in favor of Payne's executor, and determined against the plaintiff therein.

Now, while all this stir and litigation in reference to this land was pending, there was also begun and consummated negotiations for a loan with Dundee Mortgage Company, at whose sale Jno. M. Judah became the purchaser, with notice, too, at the sale, of said Stovall's claim to said land, etc. Is not any one of the above facts, much less all of them, sufficient to give the said Dundee Mortgage Company notice of appellant's interest or claim to said land, or, at least, sufficient to put said company on inquiry, which, if pursued, would have led to a discovery of the true state of the title to the land? 2 Pom. Eq. Jur., sec. 5; 1 Story's Eq. Jur., sec. 400; *Parker v. Foy*, 43 Miss., 266; *Bank of Holly Springs v. Pinson*, 58 Miss., 421.

Houston & Reynolds, for appellee.

Henry Stovall's possession was like that of the other tenants of W. W. Payne, whom the record shows was owner in 1888. If a party, at or before purchase by himself of land, is a tenant on the land under a lease, his possession afterwards will be presumed to be of the same character, and will not be notice of his deed of purchase. *Olaiborne v. Holmes*, 51 Miss., 146; *Loughridge v. Bowland*, 52 Miss., 546. This presumption will hold until some notorious and unequivocal act of exclusion. 1 Am. & Eng. Enc. L., 238; *Sands v. Hughes*, 53 N. Y., 287.

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Counsel contend that we had notice of Henry Stovall's unrecorded deed, by virtue of a deed of trust given by Henry Stovall to T. D. Payne in 1881, being recorded. The court will bear in mind that there is no deed from T. D. Payne to Henry Stovall on record, nor a deed from anyone to Henry Stovall. How, then, in looking up the title to the land, was an abstractor to find this deed of trust from Henry Stovall to T. D. Payne? There was nothing in the chain of title to show that Henry Stovall had any right to convey the land—no suggestion to look at index and see if Henry Stovall had ever conveyed it. Might as well require abstractor to examine and see whether Smith, Jones and Brown did not also convey it. So far as chain of title showed, they had as much right to convey it as Henry Stovall. Henry Stovall's deed was not recorded, therefore the deed of trust given by him was not constructive notice. But the testimony established that Stovall conveyed the land back to Payne, and, if so, this ends the case.

STOCKDALE, J., delivered the opinion of the court.

It appears from the evidence in this case, as disclosed by the record, that T. D. Payne, on the twenty-ninth of December, 1881, sold and conveyed to Henry Stovall the southeast $\frac{1}{4}$ of section 15, township 13, range 4 east, situated in Chickasaw county, Mississippi, for \$1,750, to be paid in four annual installments of \$437.50 each, commencing November 1, 1882; and that Henry Stovall executed, on the same day, a deed of trust on the same lands, to secure the payment of said four notes to T. D. Payne, B. J. Abbott being trustee, which trust deed was put upon record January 28, 1882, filed January 2, 1882, and Stovall went into or assumed possession of said lands, under said purchase, immediately upon receipt of said deed of conveyance, and held under it.

There is no dispute as to the fact that Henry Stovall was owner of that land, and occupied it as owner during the year 1882, but complainant below (appellee here) contends that, after the

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crop of 1882 had been completed, he and T. D. Payne, by verbal agreement, canceled the trade and destroyed the deed from Payne to Stovall, and that some time in 1883 Stovall and wife made a deed of conveyance of said lands to T. D. Payne, which deed was not recorded, but was lost. In support of the execution of said deed, complainant introduced the testimony of W. G. Orr, who testified that his impression was, and, on cross-examination, that his best recollection was, a deed was handed him or to his law partner, Mr. Williams—a deed from Stovall to Payne for the lands in question. Col. Orr further states: “The deed was properly acknowledged before W. A. Badenheimer, mayor of Okolona, Miss., I think. The wife joined in the deed. My impression is Henry signed his name and his wife made a x. But I merely state that as an impression.”

On cross-examination Col. Orr stated: “I remember having a conversation with Judge Frazee. . . . I think I further stated to Judge Frazee that I had lately, before that conversation, interviewed Mr. Badenheimer on the subject; that he (Badenheimer) had stated he had no recollection of such acknowledgment. . . . I now state that it is probable that, in that conversation, I might have stated to Judge Frazee that I did not then, with the lights before me, remember that it was acknowledged at all. . . . My best recollection is, that his wife signed it. . . . My recollection is, it (the deed) was on Mr. Williams’ desk the last I saw of it.”

This was the testimony upon which alone the lost deed was sought to be established. It was not recorded, and never seen nor heard of again, so far as the record discloses, nor did Mr. Payne ever inquire about it, so far as the testimony shows.

R. P. Williams testified that he is the same Williams who was a member of the law firm of McIntosh, Williams & Orr. Says he has no recollection of the southeast $\frac{1}{4}$ of section 15, township 13, range 4, but presumes it is what was sold to Henry Stovall by T. D. Payne; that, during the fall of 1883,

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this firm was employed to abstract the title to T. D. Payne's land, which he wished to sell to Reynolds & Eckford or a syndicate represented by them. "I remember that the title to a part of that land was not good, because he had sold it to Henry Stovall. I have no recollection of Payne clearing up the title. I have no recollection of T. D. Payne saying the sale between him and Stovall had been rescinded, and no recollection of Payne saying he had torn up the deed; have no recollection of any merriment in the office about it; have no recollection of advising Payne what steps to take to get the title out of Stovall, or any member of said firm doing so, as I have no recollection of any such deed. I saw no deed signed by Stovall or by Stovall and his wife."

W. D. Frazee testified: "Some time before the suit of *W. W. Payne v. Henry Stovall* was brought, I had a conversation with W. G. Orr in his office, in which Col. Orr said, as I recollect it, that Mr. Payne came into his (Orr's) office and handed him a written document or paper, which he (Payne) said was a deed from Henry Stovall to him. I saw Henry Stovall's name signed to this document, or at least Henry Stovall with a x. Of course I do not know whether Henry signed it or not. I did not read the document. Mr. Orr said he could not say whether the deed was acknowledged at all. Gracey Stovall (the wife) was not mentioned."

On cross-examination he said: "I think my memory is as distinct as a mortal mind could be of a thing that occurred that long ago. I reported it to Mr. Baskin, and have talked about it since." *Ques.* "Is it not possible that Mr. Orr might not have stated that he did not know that the deed was acknowledged at all, in view of the fact that he knew that if the deed was not acknowledged under the law it would be no deed?" *Ans.* "Mr. Orr, in that conversation, did not claim that it was a deed. He stated that Mr. Payne brought him a piece of paper, which he (Payne) said was a deed. Said 'I did not read it.' He said he could not say it was acknowledged at all."

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Henry Stovall denies that he ever consented to cancel the deed from T. D. Payne to him, denies that he ever reconveyed the land to Payne. There is nothing to show that T. D. Payne ever demanded rent of him; no act of T. D. Payne where Stovall was charged or credited with rent by T. D. Payne in his lifetime was produced, so far as the record shows. Several witnesses testify, among them a white man, sheriff of the county, that T. D. Payne declared publicly, on several occasions, and up to near the time of his death, that Henry Stovall had paid out for his land, had paid every cent he owed for his land, and used that as an inducement to other negroes to purchase land from him. He attended to Henry Stovall's business, and got separate statements from the sheriff of the amount of taxes paid by him on the land in question, so that he could settle with Henry Stovall. This land assessment was changed, as appears from the assessment roll, from T. D. Payne to Henry Stovall for 1883, which was subsequent to the alleged cancellation of the deed from Payne to Stovall. One witness testifies that he saw that deed in Stovall's possession and read it, as late as 1883.

Taking the evidence altogether, it falls far short of the accuracy and strength required to establish a lost deed that is to divest title of lands; and it would seem that but little if any importance was attached to that paper, as it was not seen nor heard of after Payne handed it in to the office of his attorneys, and Payne never looked after it, and the attorneys lost sight of it, and the complainant did not think enough of it to mention it in his deraignment of title in the bill of complaint.

On the twenty-eighth day of February, 1888, W. W. Payne, executor of the will of T. D. Payne and individually, executed a deed of trust to H. S. Caldwell, trustee, for the Dundee Mortgage & Investment Company, by which trust deed he conveyed 2,455 acres of land in Chickasaw county, Mississippi, to secure ten notes of \$1,200 each, due on December 1, 1888, and one annually thereafter. In that trust deed was included (by mistake, as appellant claims) the southeast $\frac{1}{4}$ of section 15, town-

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ship 13, range 4 east, making 2,615 acres in the face of the deed. On the twenty-ninth day of January, 1892, the trustee sold all of said lands, and John M. Judah became the purchaser—Stovall being present forbidding the sale of the said southeast $\frac{1}{4}$, section 15, township 13, range 4 east, claiming that he owned it. On the third of February, 1892, said trustee made a deed of all of said lands to John M. Judah, reciting that he had paid the purchase money, \$10,000. On the nineteenth day of December, 1892, W. W. Payne gave Henry Stovall a quitclaim deed to said lands. John M. Judah filed his bill to confirm his title to said southeast $\frac{1}{4}$ to the May, 1893, term of the Chickasaw county chancery court, first district.

But counsel for appellee—complainant below—contend earnestly that appellee is a *bona fide* purchaser for value, without notice of Stovall's adverse claim, and therefore whatever his right may have been, he lost it by neglecting to record his deed from Payne, and allowing appellee to become purchaser without notice.

Counsel for appellant contend that the record of the deed of trust from Stovall to Payne and Stovall's possession of the lands in question were sufficient notice, and upon these contentions the case depends.

Counsel for appellee insist that T. D. Payne became the owner of the land in question in 1881, and remained owner thereof until his death in 1887. But the testimony establishes beyond question, and it is not disputed, that Stovall owned the land in 1882. Col. McIntosh swears he wrote the deed from Payne to Stovall and the deed of trust from Stovall to Payne, and both were delivered in 1881. Payne admitted this in his talk with Col. Orr, in 1883, only claiming that that deed had been destroyed after the crop of 1882.

Counsel for appellee, in reference to the ability of the recorded trust deed from Stovall to Payne to secure the purchase money of this land, to warn purchasers and put them on inquiry, say: "How, then, was an abstractor to find this deed of

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trust? It would be impossible to find this deed in looking up this land." That inquiry is answered and the asseveration refuted by the fact, as shown by the record, that Mr. Williams, of the legal firm of McIntosh, Williams & Orr, when abstracting the lands of Payne, did find that deed, and reported the fact that the title to the lands in question was not good in Payne, having been sold to Stovall, and Col. Orr testifies that fact led Payne to get a deed from Stovall in 1883. Having that trust deed on the public record of the county where the land lay—which they could have seen, and ought to have seen, as Williams did see it—the trustee and the beneficiaries under the trust deed must be charged with notice of it, and with notice of whatever it would suggest to a prudent man. That deed, it seems, would point almost as unerringly to Stovall's ownership as though his deed had been recorded beside it. No man could suppose that a business man like Payne would take a deed of trust on his own land to secure \$1,750 and supplies to be advanced.

The will of T. D. Payne did not describe any lands by numbers, but devised his property generally to W. W. Payne. He did not own the land in question, and could not devise it. W. W. Payne testifies that he never intended to put the Stovall land in the Dundee trust deed, and that he informed Trustee Caldwell and John M. Judah, when he went to compromise with them, that the Stovall land was in the deed by mistake, and ought not to be there. There is no allegation that the estate of Payne was insolvent. The trust deed was not prepared by Payne nor his attorneys, but sent out from Memphis to be signed, and he signed without knowing the Stovall land was in it.

Now, as to Henry Stovall's possession. It is not disputed that he was in continuous, open and exclusive possession of the lands in question from 1881 up to the time when this suit was instituted in 1893—more than eleven years—but it is claimed he was in possession as tenant and not as owner. The place

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was known as the Stovall place all that time. W. W. Payne testifies that the place did not get its name from Captain Stovall, a former owner, but from Henry Stovall. T. D. Payne, who sold it to him, often proclaimed him, Stovall, to be the owner, he having paid for it. It was assessed to Henry Stovall in 1883, 1884, 1885 and 1886, manifestly, from the testimony, by Payne's consent, and probably by his action attending to it for Stovall. T. D. Payne claimed no rent in his lifetime. True, W. W. Payne swears he thought Stovall was a tenant, but said he knew less about that piece than any of his brother's lands; that he knew his brother had sold it to Henry Stovall, but thought Henry had not paid for it; and soon after his brother's death, W. W. Payne proceeded to try the question of ownership or tenancy of Henry Stovall as to that land, and instituted a suit of unlawful entry and detainer in December, 1887, which Henry Stovall defended successfully as owner of said lands. Later he sued out an attachment for rent, and Stovall defended that suit as owner of the land, and, after several years' litigation, Payne dismissed the suit, giving as a reason that he thought Henry would gain it, and he did not want to spend any more money on it, and gave Stovall a quitclaim deed to quiet his title.

At the time the Dundee trust deed was executed, February 28, 1888, the suit of *Payne v. Stovall*, for rent of the land in question was pending in the circuit court of Chickasaw county, first district, where the land lies. Stovall had bonded the ten bales of cotton attached, had employed attorneys, and was fighting the suit on the ground that he was owner, and not tenant, and the unlawful entry and detainer suit between the same parties, commenced in December preceding, if not terminated, was pending and defended in the same manner. So that it seems that Stovall's possession was notorious and adverse at the very time the trust deed was made and when the sale under it was made, as well as open, exclusive, and continuous.

With all the above facts, and more, before them at the very

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time the Dundee company was negotiating with Payne for the loan upon the landed security, and when the trust deed was executed, for them to claim they were innocent purchasers without notice, and that appearances indicated that Stovall was a tenant, seems entirely absurd, and especially so for appellee, when Stovall was present with his attorney and made his claim known and forbade the sale of the lands in question at the very sale at which appellee purchased.

The basis of the doctrine of notice is that it is unconscientious and fraudulent to permit a junior purchaser to defeat a prior conveyance of which he has knowledge. *Herrington v. Allen & Co.*, 48 Miss., 492.

The testimony as contained in this record so largely preponderates in favor of the proposition that we may regard it as settled that Stovall purchased and paid for, and received a valid deed to, the lands in question, and the title remains in him unless he lost it by want of notice to the trustee and beneficiaries of the Dundee trust deed.

"It has been settled by numerous cases in this state, commencing with *Dixon v. Lacoste*, 1 Smed. & M., 70, that the open possession and occupancy of land by the vendee is implied notice of his right." *Strickland v. Kirk*, 51 Miss., 795; *Perkins et al. v. Swank et al.*, 43 Miss., 349; *Bell v. Flaherty*, 45 Miss., 694.

"It has been accepted as the settled law in this state, since the case of *Dixon v. Lacoste*, 1 Smed. & M., 70, that the occupancy and open possession of land under an unregistered deed of conveyance, or bond for title or other contract of sale, imparts notice to creditors and subsequent purchasers, and gives them the same protection as though these written memorials of title had been recorded." *Taylor v. Lowenstein*, 50 Miss., 278.

We are cited to *Hiller v. Jones*, 66 Miss., 636, but that case holds that possession of land under an unrecorded deed was the equivalent of registration of the deed, while the possession

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lasted under it; but that where the record shows a perfect chain of title the purchaser need not look to a former occupancy of the land under a deed of which such party had no notice. In this case the contention is that Stovall occupied the land all the time from his purchase up to the bringing of this suit. Wherefore, by the rule above laid down, Stovall's possession was equivalent to registration of the deed all the time.

W. W. Payne became convinced that he was mistaken about Stovall's admissions making him a tenant, and that the testimony of the witness (Phillips) to whom the old negro gave up the cotton as the agent of Payne, but never turned it over so that the question could be tried, failed to make him a tenant. When the ignorant man invoked the protection of the court, represented by able attorneys, he acknowledged his mistake and dismissed his suit and gave a quitclaim deed abandoning all claim to the land.

The complainant below exhibited his bill, and presented his title to the court, by which action he challenged consideration of and objections to it, and invoked the power of the court to approve and confirm and quiet his title on its own merits, and to cancel and remove as clouds conflicting titles. It is manifest from a careful scrutiny of this whole case, that it is without equity on the part of complainant, and this court is, therefore, compelled to reverse the judgment of the court below.

The final decree of the court below is vacated and set aside, and the cause remanded.

Brief for appellants.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY v. R. W.
LAMBUTH.

RAILROADS. *Injury to animal. Wire fence. Right of way.*

If a horse is frightened by a train and runs into a place rendered dangerous by the proximity of a wire fence, erected by the company's consent on the right of way, and a bluff of the cut in which the railroad is laid, and the danger is known to the engineer in charge of the train, and he can do anything which would save the animal from its peril and fails to do it, the company is liable for injuries to the horse resulting from contact with the fence.

FROM the circuit court of Franklin county.

HON. W. P. CASSEDY, Judge.

The facts are stated in the opinion of the court.

Mayes & Harris, for appellants.

The horse was never struck by the train—was grazing by the side of the track. The engineer was under no duty to look out for him. He did not see him, and the company cannot be held liable because the horse became frightened at the train, engaged at its usual business in the usual way, and, being frightened, ran into a wire fence and injured itself. Under repeated adjudications of this state, the railroad company is not liable in this case. *Railroad Company v. Thornton*, 65 Miss., 256; 64 Miss., 637; 66 Miss., 3.

We think the railroad company violated no duty to the owner of the horse. There was no negligence shown—no intentional wrong. The engineer was not, under the repeated decisions of this court, required to keep a lookout for a horse grazing on the side of the road, and, being under no duty to see him, cannot be presumed to have seen him, and his testimony that he did not see him is absolutely uncontradicted.

Brief for appellee.

The case cited by counsel for the appellee in their brief, in 82 Maine, has no sort of application to this case, as that case was decided under a special statute of Maine which made the railroad company liable for failure to keep a fence in repair to a penalty, and under which statute the railroad company was required to fence its track. It has been repeatedly held in this state that the railroad company is under no duty to fence its track, and no duty to maintain a fence when it has been erected.

The other cases which counsel for appellee cite, which are cases from this state, are all cases in which the animals were actually struck by the train.

Proby & Clinton, on the same side.

The case at bar does not present such a question as was decided in the case of the *Illinois Central Railroad Co. v. Weathersby*, 63 Miss., 581, for the question in that case was, "whether the company was guilty of negligence in not stopping its train when the dangerous situation of the animal was discovered by its servants." Therefore we submit that the general rule of law as laid down in 19 Am. & Eng. Enc. L., 941, that railroads are not responsible for injuries not caused by actual collision, is applicable to this case.

Cassedy & Cassedy, for the appellee.

The ground between the fence and the edge of the bluff is in the shape of a wedge, being wider at the entrance and growing narrower until at the point of the tragedy it is only about two feet from the fence to the edge of the bluff. The fact that the fence had been down, leaving the "trap" open for a long time, was known to the defendant. On the day of the tragedy the horse was feeding on the commons near the railroad track. The local freight came, the horse took fright and ran in between the wire fence and the track, there being nothing to prevent it, and proceeded on his way like a frightened horse would, the ground under him getting narrower and narrower, and the en-

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gine coming closer and closer. At last he reached a point where the edge of the cut and the wire fence came almost together, and as the engine in the meantime had caught up with him, and was running alongside, he attempted to jump the wire fence and failed. He became entangled in the wire and died from his injuries. There was nothing to hinder the engineer or fireman from seeing him, and a glance at the horse and ground would have conveyed the idea to an ordinary mind that the horse was frightened, and was getting into a perilous position.

The questions to be decided by the court are, first, was the company negligent in leaving open the gap after being notified that it was open and dangerous to stock? secondly, was the engineer negligent in the performance of his duty? Of course the train did not kill the horse, but the train and the open gap, the cut and the wire fence, combined, brought about his death. It is the duty of the engineer to take into consideration the nature of stock and their known habits, and exercise due care to avoid injury, self-inflicted as well as from actual collision. 64 Miss., 115. The evidence shows that when the engine started it was several hundred yards from the horse; it was emitting steam from the sides; the horse became frightened and ran into the "trap," and the engine proceeded on its way. The engineer, under the circumstances, could have seen the horse had he exercised due care and looked ahead, or the fireman could have seen the animal, there being no obstruction, curve or bank, or anything to hide the horse. The question as to whether proper care was used is one of fact, and is for the jury, and was decided in favor of appellee. 68 Miss., 366.

STOCKDALE, J., delivered the opinion of the court.

This cause was in the circuit court of Franklin county, on appeal from justice's court, and R. W. Lambuth, plaintiff below, recovered judgment against appellants, defendants below, for \$115 dollars and costs, and from that judgment this appeal comes here.

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The record discloses that the right of way of appellant's road, north of the depot at Roxey, Franklin county, Miss., was conveyed to the grantor of said company by M. F. Byrd, reserving to himself the right to cultivate what was not in actual use by the company in operating its road; that, about one hundred yards north of the depot, two wire fences commenced, one at the west side and one at the east side of the right of way. These fences extended northward about a quarter of a mile, converging to a stock gap in the railroad track. Formerly, there was a trestle in the railroad track between the points where these two fences commenced, and a wire fence extended across under said trestle, connecting the south ends of said wire fences, thus forming a perfect inclosure, into which stock could not enter. The railroad company made an embankment of earth in place of said trestlework, and cut the said cross fence, leaving an open space through which stock could enter, but the side fences, and stock gap at the north end of them, remained, and there was no egress in that direction. Some distance north of where the said trestle and cross fence were, there is a cut through a hill for the railroad track, and the said wire fence, on the west side of the railroad, gradually approaches that cut until it touches, or comes very near, the bank (or bluff, as some witnesses denominate it), where it is five or six feet high.

The local freight train came from the south on appellant's road, and stopped at the depot at Roxey. At that time a horse of R. W. Lambuth was grazing near the side track north of the depot. The engine was cut loose, gave two blasts of its whistle, at which the horse became alarmed and ran north, going between said west wire fence and the cut until he arrived at a point where the two came together—the bank five feet high. The engine, with steam escaping from the stop cocks of both cylinders and from the dome, moved north in the rear of the horse and was about opposite him when he reached that point and about fifteen or twenty feet from him, and the horse, not being able to proceed

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farther, became so frightened that he undertook to jump the wire fence and became entangled, and struggled until he was terribly cut and one limb broken and died. The engine never came in contact with the horse. The fence was on the right of way of appellants, and appellants' servants knew the situation of the fences and the cut and its banks. The fence was on the right of way by agreement of appellant with Byrd, as is shown by the deed of Byrd to appellant for the right of way. The charter of appellants' grantor gave it the right of way, and, having that right, it bargained with Byrd for less right of way, giving him the right to use a part of that way. Certainly appellee had no hand in putting the fence and bank in the relative positions that resulted in the destruction of his horse.

There are two causes of error urged: (1) The court erred in refusing the peremptory instruction asked by defendants; (2) the verdict is contrary to law and the evidence. These were the causes assigned in the motion for a new trial. Appellant's counsel submit the proposition that the case at bar differs from *I. C. R. R. Co. v. Weathersby*, 63 Miss., 581, in that the engineer in this case swears he never saw the animal at all. Had the servants of appellant seen the appellee's horse running before the engine, into the place where he was killed, and not stopped the engine nor cut off the escaping steam, both of which could have been easily and quickly done, the facts in this case would have been stronger than the *Weathersby* case, and we might well declare as was there declared. The sole question is whether the company was guilty of negligence in not stopping its train when the dangerous situation of the animal was discovered by its servants. It must have been plain to anyone who saw the horse running between that fence and bank, frightened as he was, and the cause of his fright coming closer and closer behind him, that he would inevitably be injured. The testimony shows, beyond doubt, that the engine was running up the main track; that the horse was running up on the west side of the track, inside of the fence; that the train gained

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steadily on the horse until it came opposite him; that he was off to the left side of the engine, about fifteen to twenty feet, running at great speed.

Thornton Anderson testified that the engine ran up beside the horse, and the engine and horse were running beside each other, and the "popping" off of steam was getting greater when the horse came to the bank, and he tried to turn around, and fell into the fence. "I saw the fireman swing himself out of the cab window after the horse went up the track." The horse was off to the left fifteen to twenty feet and forward of the engine at first. The engine then gained upon the horse, and ran up nearly beside him, the horse running in a great fright, and it is difficult to imagine how the fireman could avoid seeing him. The fireman was not put upon the witness stand to tell whether he saw the horse and told the engineer. The engineer was put on the stand, and testified that he was at his post of duty on the right of the engine, and did not see the horse. He did not say whether he was told the horse was running there, or knew it. Simply that he did not see him. He did not dispute any testimony delivered by any witness. The jury had the right to believe that the fireman saw the horse, and that he told the engineer, and probably did so believe, and found their verdict on account of the negligence of the servants of the company in not stopping the engine or cutting off the escape of the steam. That was a question proper for the jury to determine, and therefore the court did not err in refusing the peremptory instruction asked by defendants. The jury heard the witnesses, and we do not find in the record sufficient grounds to disturb the verdict, nor would we have disturbed it had it been for defendant. The judgment of the court below is

Affirmed.

Brief for appellant.

ERNEST GILLEYLEN *v.* E. R. MCKINNEY ET AL.GUARDIAN AND WARD. *Final settlement. Surcharging account.*

In case a guardian makes a final settlement in the court with the ward, who has become adult, and the ward appears and files an answer, admitting the correctness of the account, and acknowledges receipt of the balance shown to be due, and the court approves the settlement and decrees the payment to have been made, and the ward afterwards files a bill denying the payment and seeking to surcharge the account, and the material facts thereof are denied by the answer to the bill, a decree dismissing the bill and refusing to open the account is correct, if the evidence establishes the truth of the answer.

FROM the chancery court of Monroe county.

HON. BAXTER MCFARLAND, Chancellor.

In 1891, D. C. Gilleylen, as guardian of appellant, Ernest Gilleylen, filed his final account, showing a balance due the ward, and, at the September term of the court, the said final account was approved, the decree adjudging that the ward was of age, and had been paid the balance due him shown by the final account. In August, 1893, the bill in this case was filed by the appellant, seeking to surcharge and falsify the final account, disputing the payment of the balance as decreed, to vacate a deed made by the guardian as fraudulent as to creditors, and to vacate a deed which the appellant, the ward, had made to D. C. Gilleylen, the guardian, as having been obtained by fraud. The answer to the bill denied all of its material averments, and the cause was heard on the proof. Additional facts are stated in the opinion. The chancery court dismissed the bill, and complainant appealed.

Clifton & Eckford, for appellant.

As a statutory bill of review or a bill to surcharge the

Brief for appellant.

guardian's account, it being filed within two years, the appellant would be allowed to attack the decree by merely alleging error in it, pointing it out, and offering to show it by evidence aliunde. *Maye v. Clancy*, 57 Miss., 674 (R. C. 1892, § 1960; acts 1894, p. 45; Hutch. code, p. 728, § 3); *Gadberry v. Perry*, 27 Miss., 114.

The sworn answer by E. Gilleylen acknowledging that the final account was correct, and the receipt of the amount of money shown to be due, ought not to work an estoppel in this case, for the following reasons, to wit: (1) It was obtained by undue influence directly exercised by the guardian over his ward, which, in cases like this, is the same as actual fraud; (2) it was obtained by the guardian, through the means of a false statement of an existing fact, on which the ward relied and acted.

There is no claim or pretense that one dollar of the balance shown by the final account was ever paid to E. Gilleylen, at the time the answer was signed or afterwards, but that it had been disbursed in accordance with instructions from the ward, and hence he truly acknowledged that he had received the money. We submit that the transaction, as claimed by the guardian, was a gift from the ward to his guardian.

We understand the rule of law applicable here to be this: That, in all contracts, conveyances or transactions between guardian and ward, there arises out of their relationship a presumption of the law of undue influence, and that this *prima facie* presumption becomes conclusive whenever it is made to appear that the guardian received any benefits from the transaction. It is a rule of public policy applied to all fiduciary relationships, such as attorney and client, principal and agent, trustee and *cestui que trust*, independent of any fraud in fact or intent to fraud. *Meek v. Perry*, 7 Ga., 190, 245, 252; *Goodrich v. Harrison*, 32 S. W., 622; *Folkes v. Lombard*, 11 So. Rep. (Miss.), 729; *Hemphill v. Helford*, 50 N. W., 301; *Pirent v. Kerrigan*, 20 Am. Rep., 226, 227; *Earhart v. Holmes*,

Brief for appellees.

66 N. W., 898; *Gillett v. Wiley*, 19 N. E., 288-290; *McParland v. Larkin*, 39 N. E., 609-611; 2 Pom. Eq., 961; 1 Story's Eq., sec. 317.

This is the law in the case, and fatal to appellee, even if the guardian had used appellant's estate to keep his brothers at school on direct instructions from appellant. But there can be no doubt about the actual fraud if we can show that appellant's money was not sent to his brothers, and this brings us to the second reason why this decree cannot work an estoppel against appellant, and that is because the guardian made a false statement of an existing fact, on which the ward relied and acted.

Frank Johnston, for the appellees.

This is a remarkable proceeding by the complainant against his grandfather, an old, helpless, and penniless man, who had devoted seventeen years of his life, of care, attention and his own substance, to the support and education of his three grandsons, including the complainant.

In 1891 D. C. Gilleylen filed his final account and petition for his discharge as guardian of the complainant. All the accounts, including the final account, had been sent to the complainant for his examination, and an answer for him to sign, by the attorneys of D. C. Gilleylen. The answer was filed, duly sworn to by the complainant, and states that the accounts had been examined, were correctly stated, that the balance had been fully paid, and prays for the discharge of the guardian. Upon this the court discharged the guardian, reciting in the final decree that the ward, then of age, had admitted in his answer of record, that he had examined the accounts, and that they were correct, and also acknowledged full satisfaction of the balance found due.

Conceding, for the argument, that the complainant can contradict or impugn the decree of the court in the guardianship proceedings, I respectfully submit to the court that the testi-

Opinion of the court.

mony shows that the balance was paid by D. C. Gilleylen. The counsel for the appellant concedes that the preponderance of the evidence supports the answer on this point, and indicates that the balance was paid, as stated in the answer, but they insist that the rule of law is so strong that requires the highest good faith of guardians, that higher and more satisfactory proof of the denial of the answer should have been made. The law requires good faith and entire fairness and candor of guardians in their transactions with their wards, but it does not require impossibilities in the way of proof of fairness and good faith. The court must be satisfied that there has been fairness, and no overreaching, by proper and competent evidence, and will scrutinize all dealings between the guardian and ward with care and circumspection; but this is the full practical extent of the rule, and this satisfies the reason upon which the doctrine rests.

It appears in this case, clearly and satisfactorily, that this complainant authorized his guardian to use part of his share of the estate to complete the medical education of his brother, J. R. Gilleylen, and the education of his other brother. The complainant was then making his own living, was of age, and chose to be generous to his brothers. The complainant, in his deposition, denies that he ever authorized this use of his money. But it clearly appears that he did authorize it, from the depositions of a number of worthy witnesses.

WOODS, C. J., delivered the opinion of the court.

Giving all due weight to the rule of law which requires the closest scrutiny of dealings between guardian and ward, we see no good reason for disturbing the decree of the learned court below.

When the final account of the guardian was filed in court in September, 1891, it was accompanied by the sworn answer of the ward, then of full age, acknowledging that the account was correct, and stating that he had examined, in person and by attorney, said final account, and all preceding annual accounts,

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and acknowledging satisfaction in full of the sum appearing by said final account to be due him. All these sworn statements were incorporated in and became part of the final decree passing the final account and discharging the guardian. When the final account of the guardian was filed, and when passed, the ward had been virtually emancipated, and had been before that time (how long before does not appear), and was then, living, not with his guardian, nor under his influence and control, but in another state, and was, and for some time had been, engaged in active business for himself, and free from the supervision of the guardian.

It is very evident that the appellant was perfectly aware of the vital matter referred to in the final account, to wit: the balance apparently due him by the appellee, as guardian, and of the facts which constituted the satisfaction in full thereof, to which he swore in his answer to that account. Indeed, the appellant is so completely overwhelmed by all the disinterested witnesses as to the manner in which this full satisfaction was had, that the court below could not well have done otherwise than discredit the evidence of appellant, and refuse to either disturb the final decree on the guardian's final account, or enforce payment again of the \$965 apparently due thereby to the ward.

The decree now appealed from properly denied the cancellation of the two conveyances referred to in complainant's bill, and dismissed the same. The whole proceeding appears to us to be devoid of any substantial merit.

Affirmed.

Brief for appellants.

MARY S. REID ET AL. v. YAZOO & MISSISSIPPI VALLEY
RAILROAD CO.TAX TITLE. *Invalidity. Recovery of taxes paid. Lien.*

A purchaser at tax sale, who pays taxes, believing the land to be his own, can, after his title is defeated by the real owner, enforce a lien on the land for the amount of the taxes paid by his purchase, and subsequently paid by him before the invalidity of his claim is adjudicated.

FROM the chancery court of Quitman county.

HON. A. H. LONGINO, Chancellor.

The facts are stated in the opinion.

J. A. P. Campbell, for appellants.

The right asserted by the bill is purely statutory. The constitution, sec. 160, has nothing to do with it, and, if it is not brought by the bill within § 3830 of the code, it cannot be maintained. The case of *Ingersoll v. Jeffords*, 55 Miss., 37, was held to be within the statute.

The bill is fatally defective in not averring that the sole and only title of complainant was a tax title, and that it had been canceled. It is true that the bill shows that the complainant had a tax title (a perfect one it claims), but what other title or claim of title it may have had, or on what of many conceivable grounds it may have been assailed and vacated, is not shown by it. It seems the bill is wholly insufficient to bring the case within the statute, which is necessary to the enforcement of the purely statutory right.

Fitzgerald & Maynard, on the same side.

Appellants did not assail or impeach the claim of the appellee, which they sought to have set aside, and which was set aside,

Brief for appellee.

as a cloud on appellants' title as a defective tax title. Appellants' bill to remove the title or claim of the appellee as a cloud on their title, made no allegation whatever that the appellee's claim was a defective tax title. Appellants' is a general decree, quieting their title as against any claim held at its rendition by the appellee, and we quote as strictly applicable to this case, and clearly decisive of it, the following from *Indiana, etc., Railroad Co. v. Allen*, 3 Am. St. Rep., 652: "Many authorities support the doctrine that a decree in an action to quiet title effectually adjudicates all claims to an interest in the land, whatever their character, existing at the time the decree was rendered, and not protected by it." A general decree to quiet title settles all questions affecting the right of the owner to enjoy his land, whatever their form or character. We can find no decision asserting a different doctrine, nor have counsel referred to a single case that suggests a different rule.

Mayes & Harris, for appellee.

We rely upon the cases of *Cogburn v. Hunt*, 56 Miss., 724; *Preston v. Banks*, 71 Miss., 601. These cases are conclusive of the right of appellee to have the relief prayed for. Our adversaries' propositions, boiled down, are these: That those cases only hold that taxes may be recovered, and recovered by a separate and subsequent proceeding, where the original proceeding was a bill to cancel tax titles; that their original bill and their final decree did, neither of them, speak of tax titles, but were a general assault on and removal of all such claim as existed in appellee; that, consequently, the record not showing that the appellants obtained their decree because of a defective tax title held by appellee, the rule of those cases does not apply.

The whole argument assumes that the rule laid down in the cases cited above is special and exceptional, as a peculiar part of our revenue laws distinctively, and that, in order to obtain the relief prayed for, the complainant must show that his title failed because, and because only, it was a defective tax title,

Brief for appellee.

while, in truth, those cases only applied to the special conditions a broader principle. That principle may be roughly formulated thus: In all cases in which one pays taxes on the lands of another, provided that in doing so he is not a mere volunteer, he is entitled to be subrogated to the liens of the taxes paid, and it is not true that such is the case only where he has bought a defective tax title, which is canceled in his hands.

This is shown, amongst others, by the case of *Ingersoll v. Jeffords*, 55 Miss., 37. In that case it is true that Jeffords had held a tax title, but that title had been disposed of by a decree of the bankrupt court, and the taxes paid by him were paid after such vacating of his title, and were so paid because the lands were assessed to him. The court held that he was not a volunteer, and decreed those subsequently paid taxes to be a lien in his favor.

Our codes expressly provide that, even in ejectment, the unsuccessful defendant may in all cases (and this, of course, means in every case in which he shall be determined to hold the weaker title) propound and recover taxes paid by him, including interest, costs and damages incident to such taxes. The privilege extends to every case of ejectment by title paramount, and the only restriction is that the defendant must have paid the taxes lawfully, which is to say, that the taxes must be in fact lawful taxes, and the payment must not have been as a mere volunteer.

Even if it were the law that a complainant is only entitled to a decree for taxes paid when his title is canceled as a defective tax title, such rule would be no answer to this bill. The title canceled was a tax title, and appellants having assailed it, and having got the court below to cancel it on the ground that it was defective and beclouding as against their own title, cannot now be heard to argue that we have been cut out of a substantial right because it may have been a good title. They cannot blow hot and cold in the same transaction.

Opinion of the court.

STOCKDALE, J., delivered the opinion of the court.

Appellee filed its bill of complaint in the chancery court of Quitman county to collect certain taxes alleged to be due it on lands situated in Quitman county (describing them), now owned by appellant, to which bill of complaint the defendants below (appellants here) demurred, which, being overruled, they appealed the cause to this court. Complainants allege, in their bill, that on October 3, 1881, the Memphis & Vicksburg Railroad Company purchased from Gwin and Hemmingway, commissioners appointed by the chancery court of Hinds county in the case of *Green v. Gibbs et al.*, 4,120 acres of land, then situated in Tunica county, now in Quitman county, describing the same by numbers, etc.; that afterwards the Louisville, New Orleans & Texas Railroad Company, having acquired, by consolidation and merger, the interest of the Memphis & Vicksburg Railroad Company therein, purchased all of said lands from the State of Mississippi; that appellee, believing it had a good title to said lands in 1881, paid the taxes thereon from that date up to and including the year 1894, in good faith, which taxes, with damages and interest added, amounted to \$4,158.17, as per statement, etc.; that on the twenty-first day of October, 1891, the defendants in said cause, Mary S. Reid *et al.*, filed their original bill against the said railroad company (appellees here) to have the title of said railroad company canceled as a cloud upon their title, which they alleged to be good, and the said railroad company, failing to answer said bill, the complainants therein obtained a *pro confesso* and final decree canceling said title of the railroad company; that in March, 1892, the said railroad company (appellee) filed its bill to set aside the said *pro confesso* and final decrees, which said cause came to this court on appeal, and the bill was finally dismissed here in March, 1895, and said complainant's title adjudged to be invalid and canceled; that complainants had acquired, by their said purchase, the title that the state held to said lands, which title the state acquired by a tax sale made on the eighteenth day

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of January, 1872, and twenty-second day of January, 1873, by the tax collector of Tunica county to the levee board No. 1, which title afterwards vested in the state by operation of the statute of 1876.

Under this state of facts, complainant below (appellee here), having succeeded to all the rights of Louisville, New Orleans & Texas Railroad Company, filed its bill to enforce a lien upon the said lands in its favor, for taxes paid on said lands and damages thereon from 1872 until 1894, claiming that it is entitled to recover, in addition to the taxes paid out by it during its ownership of said lands, and damages and interest thereon, the amount for which said lands were sold to No. 1 levee board in 1872 and 1873, with fifty per centum damages thereon and interest to date, amounting in all to \$8,321.54; and also to recover the still additional sum of \$5,000—state and county taxes suspended during the period from 1872 to 1881, while No. 1 levee board held the lands, the whole claim amounting to \$13,321.54.

To this bill the defendants below interposed a demurrer, disputing the right of complainant to recover anything, or to have any lien upon said lands, on the showing made by its bill of complaint. The chancellor overruled the demurrer, and required defendants to answer within thirty days, and defendants appealed from that decree.

The allegations of the bill, being admitted by the demurrer, show that appellees purchased, in 1881, whatever title the state had, which the bill alleges was a tax title acquired through the purchase of said lands by No. 1 levee board, in 1872-73, and that it paid the taxes thereon from 1881 to 1894 in good faith, and that, in 1891, its title was declared to be invalid and canceled. We think these averments are sufficient to retain the bill in court for the purpose of ascertaining the amount of such payments, if any, and adjusting the rights of the parties.

The bill, however, fails to show that appellee paid the amount for which the lands in question were sold to No. 1

Statement of the case.

levee board, or that it paid the \$5,000 abated taxes, for which sums it claims reimbursement, and it cannot recover those sums nor any part thereof. The bill fails to show any legal liability on itself to pay the taxes on said lands after December 16, 1891, the date of the decree canceling its title, and appellee cannot recover nor have a lien on said lands for taxes paid after that date. It has not brought itself within the statute as construed in *Ingersoll v. Jeffords*, 55 Miss., 37.

The decree overruling the demurrer by the court below is affirmed and the cause remanded for further proceedings in accordance with this opinion, with leave to appellants to answer the bill within sixty days after the mandate of this court shall have been filed in the court below.

ABRAHAM TUTEUR v. R. D. BROWN ET AL.

1. MORTGAGES. *Equity of redemption. Limitation. Code 1892, § 2732.*

A mortgagor who permits the mortgagee, or those holding under him, to remain in possession of the mortgaged land for more than ten years after breach of condition, is, under code 1892, § 2732 (code 1880, § 2666), barred of all equity of redemption.

2. SAME. *Cloud on title. Parties.*

A mortgagor who, by limitation, is barred of all equity of redemption, and who has conveyed all interest in the land, is neither a necessary or proper party to a bill to remove clouds from title.

FROM the chancery court of Madison county.

HON. H. C. CONN, Chancellor.

Branigan owned the land in controversy, and executed a mortgage upon it to Garrison. At the maturity of the mortgage debt, Garrison, more than ten years before this suit was begun, took possession, and, while in possession, he mortgaged the premises to Brown, and, at the maturity of the debt to

Brief for appellant.

Brown, the latter took possession from Garrison, and is yet in the actual occupancy of the place. There was no pretense of any acknowledgment of the mortgagor's (Branigan's) title or right within ten years before suit begun. Branigan, more than ten years after he had surrendered the possession of the land, conveyed his interest therein to appellant, who began to assert ownership, and Garrison and Brown filed their bill in this case to cancel the deed to appellant as a cloud on the title. Appellant's demurrer to the bill being overruled by the court below, he appealed.

W. H. Powell, for appellant.

The maxim, "once a mortgage, always a mortgage," applies. 15 Am. & Eng. Enc. L., 725 and notes. The equity of redemption cannot be restrained or cut off by agreement. The attempt to do so in the mortgages at bar are void. *Ib.*, pp. 791, 792, and note 8. The right cannot be waived. *Ib.*, p. 827; Pingrey on Mort., vol. 1, pp. 48, 49, 55; 24 Miss., 376; 40 Miss., 469. Garrison is the mortgagee of Branigan, and Brown is the mortgagee of Garrison. Their possession exists only for the protection of their security for the collection of their debts, and, when done, they should have returned the possession of the property to Branigan or his vendee, Tuteur. Pingrey on Mort., vol. 1, pp. 12, 13, 14. It was held in 54 Miss., 357, that when the mortgagee enters, he holds so as to realize out of the income his debt, and when that has been satisfied, he holds, as trustee, for the mortgagor, to whom he shall account.

Surely, it will never be held by this court that a trustee can, under the circumstances of this case, invoke the aid of a court of equity to fortify his title by a claim of adverse possession against his *cestuis que trust*. It was the duty of Garrison to his mortgagor, Branigan, when he took possession, to receive the rents of the property and apply them to the payment of the secured debt, and, when paid, to have returned the possession

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to Branigan. He failed in his duty, and now seeks the aid of a court of equity to justify him in a breach of duty, by confirming his claim of title by limitation. Equity, in such a case, will leave the complainants where it finds them, and to do that will necessitate the sustaining of the demurrer, and a dismissal of the bill. It is absolutely certain that appellees have no standing in this case, unless they can rest upon the statute of limitations, and they being the moving actors, cannot invoke the aid of equity for such purpose. It was their duty to have given distinct notice to Branigan that they intended to assert a hostile title to him, before the statute of limitations could begin to run.

J. W. Downs, for the appellee.

Garrison took possession, and held the lands adversely until he conveyed to Brown, and Brown has held adversely since. This adverse holding not only cuts off and extinguishes any remedy Branigan ever had, but extinguishes the right as well. Code of 1880, § 2666; code of 1892, § 2752; *Little v. Teague*, 60 Miss., 115; *Ellis v. Murray*, 28 Miss., 129; *Ford v. Wilson*, 35 Miss., 490. It is competent to join one adverse possession with another. *Benson v. Stewart*, 30 Miss., 49.

Branigan has no interest in the controversy, and is not a necessary party to it. Garrison, though not asserting it, has an equity of redemption, and is a proper party.

WOODS, C. J., delivered the opinion of the court.

The conveyances from Branigan to Garrison and from Garrison to Brown were securities for the payment of the sums named in them, and must be held to be mortgages. But, although mortgages, Branigan is now barred of any right to assert his equity of redemption, by reason of his failure to bring his action for that purpose for more than ten years after condition broken, and after possession by the mortgagee, or his alienee, during all that period. As to him the title of ap-

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pellee, Brown, is perfect by limitation. See the opinion of this court in *Little v. Teague*, 60 Miss., 115, and particularly the last sentence in that opinion.

Branigan was neither a proper nor a necessary party to the bill in this case. He had no sort of connection with, nor interest in, the subject-matter of the litigation, under the view hereinbefore announced. Garrison was a proper, though not a necessary, party. He has elected to appear as the co-complainant of his vendee or mortgagee, and of this the appellant has no reason to complain.

The decree of the court below is affirmed, with leave to appellant to answer within thirty days after mandate filed.

M. F. POWERS v. THE STATE OF MISSISSIPPI.

1. CRIMINAL LAW. *Reasonable doubt. Instruction.*

An instruction which undertakes to define a reasonable doubt ought not to be given. *Brown v. State*, 72 Miss., 95; *Burt v. State. Id.* 408. approved.

2. SAME. *Evidence. Character.*

Evidence of the good character of the accused should be left to the jury without any instruction from the court as to its value.

3. SAME. *Declaration to accused by deceased. Dying declaration. Conclusion.*

A statement by decedent, otherwise admissible as a dying declaration, made to the accused in these words: "You have killed me without cause," is not incompetent because the expression of a mere conclusion.

FROM the circuit court of Panola county, second district.

HON. Z. M. STEPHENS, Judge.

Appellant was indicted for the murder of one Mills, was tried and convicted of manslaughter, and appealed. On the

74	777
75	576
75	598
74	777
77	762

74	777
79	18

74	777
83	697

74	777
84	106

74	777
94	123

Brief for appellant.

trial it was shown that appellant shot Mills, that almost immediately after the shooting, and before Mills was removed from the scene of the conflict, and when he was *in extremis*, appellant walked up and said to decedent that he "was sorry he did it" or "sorry that he had to do it" (witnesses were not certain which form of expression was used); and that deceased responded: "You have killed me without cause." To the introduction of the statement of deceased objection was made that the statement was a mere conclusion, but the objection was overruled. Evidence of the good character of the defendant previous to the homicide was introduced by the defense. The instructions appear in the opinion.

Stone & Lowrey and L. L. Pearson, for appellant.

The eighth instruction for the state, to be "satisfied as a fair, reasonable and conscientious man," is not equivalent to finding defendant guilty beyond every reasonable doubt. *Burt v. State*, 72 Miss., 408; *Hammond v. State*, 21 So. Rep., No. 6.

The only reasonable construction of the twelfth charge is that, in determining the guilt or innocence of the defendant, the jury must eliminate all evidence of character and settle his fate by the other evidence in the case, but if from this the jury are unable to say whether he is guilty or innocent, then the jury may consider the question of character. This is not the law, as expressly held in *Coleman v. State*; *Hammond v. State*, 21 So. Rep., No. 6; *Rice on Crim. Ev.*, secs. 371, 373, 375, 378, 379.

The statement of deceased to appellant, after the killing, "You have killed me without cause," was admitted by the court as a dying declaration. If the deceased had been present in court testifying, he could not have given his conclusions from the facts. A dying declaration must be a narrative of the facts. We are aware that this court, in *Payne v. State*, 61 Miss., 161, has held almost the identical language here used by the deceased admissible as a dying declaration, but, with all due

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deference to the learned judge who rendered the opinion, we respectfully ask the court again to pass upon whether the language here used is not a conclusion, rather than a statement of the facts attending the killing.

Wiley N. Nash, attorney-general, for appellee.

The reporter fails to find a brief for appellee on file.

WOODS, C. J., delivered the opinion of the court.

The eighth instruction given for the state is in these words, viz.: "The court instructs the jury that while it is true they must, in order to convict the accused, believe him guilty beyond a reasonable doubt, arising out of the evidence, and to a moral certainty, yet this thing of a reasonable doubt the law cannot and does not undertake to define. The jury are not required to know that the defendant is guilty, but it is only necessary, in order to convict, that the jury, after a full consideration and comparison of all the evidence, should be satisfied, from the evidence, as fair, reasonable, and conscientious men, of the defendant's guilt, and if they so believe it is their duty to convict."

Singularly enough, this instruction very properly and accurately states the impossibility of and the aversion to, by the law, of doing that which is incapable of being done, to wit, the definition of a term which is indefinable, and then proceeds in an attempt to enlighten the jury as to what is a reasonable doubt—to declare, in effect, that when all the evidence satisfies the jury, as fair, reasonable, and conscientious men, of defendant's guilt, then it is their duty to convict, which is equivalent to stating that in such case there is no reasonable doubt. The error of the instruction is glaring. Every jury is presumably composed of fair, reasonable, and conscientious men. The law requires the selection of such men in cases of murder, and when the competency of the jurors has been declared by the court under whose direction the selection of jurors is made, the further presumption arises that this requirement of the law has been

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complied with. Now, with such a jury, composed of such men, the instruction states that it is only necessary that all the evidence, after full consideration and comparison of it by the jury, shall satisfy the jury of defendant's guilt. The idea of satisfaction to a moral certainty, and beyond all reasonable doubt, is effectively put aside, and satisfaction only of defendant's guilt is substituted. Satisfied! How satisfied, and to what extent? Beyond all reasonable doubt? To a moral certainty, and to the exclusion of every reasonable doubt? No. The concluding member of the instruction broadly declares that satisfaction—mere satisfaction—of defendant's guilt, generated by the evidence in the minds of a jury (a fair, reasonable, and conscientious jury, if you choose to so characterize the jury—a characterization presumably applicable to every jury), is sufficient to warrant a conviction. Satisfaction of guilt is not the equivalent of satisfaction of guilt beyond a reasonable doubt. This charge falls under the condemnation of our opinion in the case of *Brown v. State*, 72 Miss., p. 95, where we first animadverted upon a charge infected with the vice which inheres in this eighth instruction in the present case. It falls under the condemnation of our opinion in the case of *Burt v. State*, 72 Miss., 408, which followed and reaffirmed what was held in *Brown's* case. It falls under the condemnation of our opinion in the case of *Hammond v. State*, delivered January 18, 1897, and to be reported in 74 Miss. (*Ante*, 214.) We are constrained again to condemn it. "Precept upon precept, line upon line, here a little and there a little," is one method of inculcating legal truths, as it is of teaching scriptural truths, and we patiently and hopefully await the results of this method of winning bench and bar to a recognition of and acquiescence in the judgments of this court.

The twelfth instruction given for the state is also erroneous. This charge is in these words, viz.: "The court instructs the jury for the state that if the facts in evidence are sufficient to satisfy their minds of the guilt of the defendant, character, however excellent, is no subject for their consideration, but if

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they entertain any doubt, from the evidence, of defendant's guilt, they may properly turn their attention to the good character of the defendant." This charge informs the jury that in case of doubt—reasonable doubt, of course—of defendant's guilt arising from the evidence, then the defendant's good character may be turned to by the jury. Why turn to it at all after doubt of guilt is engendered by all the other evidence? And why permit evidence of good character to be offered at all if it is only to be considered after doubt of guilt has been generated by all the other evidence? In the case of *Coleman v. State*, 59 Miss., 484, this court said: "Evidence of the good character of the accused should go to the jury as any other fact, and its influence in the determination of the case should be left to the jury, without any intimation from the court of its value. The court should not tell the jury that satisfactory evidence of the good character of the accused is or is not sufficient to raise a reasonable doubt of his guilt. The jury is to have this evidence as an aid to estimate the other evidence, and by the light of the whole to reach a verdict." In the very recent case of *Hammond v. State*, *supra*, we cited, quoted from, and reaffirmed our adherence to the principle announced in *Coleman's* case.

The evidence of the statement made by the deceased to the accused, to the effect that "You have killed me without cause," was properly admitted as a dying declaration, as well as a statement made to the accused and not denied by him. *Payne v. State*, 61 Miss., 161, on this point is almost identical with the present case, and is direct authority on this particular question. *Kendrick v. State*, 55 Miss., 436, is in perfect harmony with *Payne v. State*, the opinion in both cases being delivered by the same learned judge, and its facts clearly distinguish it from the present case as well as from *Payne's* case. We find no other reversible errors in the record, and we regret the necessity of reversing the judgment below for the errors in giving the instructions for the state, numbered eight and twelve.

Reversed and remanded.

Syllabus.

PULLMAN PALACE CAR CO. v. TRUUMAN P. LAWRENCE.

1. TRESPASS. *Jurisdiction. Citizenship. Location. Transitory action.*

It is no defense to a transitory action of trespass brought in this state that the wrong was done and injury inflicted in another state, and that both plaintiff and defendant, a foreign corporation, were, at the time, are now, and have been continuously since, residents and citizens of such other state.

2. FOREIGN CORPORATIONS. *Jurisdiction. Code 1892, § 849.*

Under code 1892, § 849, foreign corporations may sue and be sued in this state as individual nonresidents may sue and be sued.

3. CAUSE OF ACTION. *Laws governing. Tort.*

Whether or not an *ex delicto* cause of action exists upon a state of facts, is to be determined by the law of the place where the matters complained of occurred.

4. SLEEPING CAR COMPANY. *Legal character. Laws of Illinois.*

Under the constitution of this state, all sleeping car companies are common carriers, but they are not technically so by the laws of Illinois.

5. PUNITIVE DAMAGES. *Law of Illinois. Corporations.*

It is the settled law of Illinois that corporations are liable for all the acts of their agents and servants who commit wrong while performing the master's business in the scope of their employment, and this to the extent of liability for punitive damages in proper cases.

5. SAME. *Wealth of defendant.*

The wealth or pecuniary condition of a defendant may be shown with a view of enabling the jury to inflict proper damages by way of punishment in a case where punitive damages may be recovered.

6. PROOF OF WEALTH. *Corporation.*

It is not impertinent or incompetent, where proof of the wealth of a corporation defendant is admissible, to inquire (a) the entire paid-up capital stock of the company; (b) what its liabilities are;

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(c) what are the assets of the company; (d) what was the surplus of the company over and above liabilities, and (e) what dividends had been paid stockholders for five years past, and how they were paid.

7. TORT BY AGENT. *Ratification by principal.*

If a defendant corporation be advised by one of its superior agents of a tort against a stranger committed by a subordinate agent, and strenuously endeavors to prove that the act of its subordinate agent was not tortious, and, when sued for the wrong, makes an unwarranted and violent attack on the conduct and character of the plaintiff, a verdict against it is justified on the ground of its having ratified the wrong.

8. ADVOCATE. *Remarks of counsel. Exceptions. Practice.*

If improper remarks are made by counsel, it is the duty of the court to interpose, but if the court fail to do so, it is the duty of opposing counsel to call attention to the impropriety. If opposing counsel fail, the wrong will not be corrected in the supreme court except in extreme cases of abuse of the advocate's privilege.

9. EXCESSIVE DAMAGES.

There is no fixed standard for measuring damages in actions for torts. Each case must depend largely on its own facts.

FROM the circuit court of Claiborne county.

HON. W. K. McLAURIN, Judge.

The facts are stated in the opinion of the court.

Percy Roberts and J. McC. Martin, for appellant.

Question of jurisdiction.—Can a citizen residing in a foreign state sue the Pullman Palace Car Company, which is a citizen of and resident in the same foreign state with himself, in the circuit court of Mississippi, for a tort committed in the foreign state, of which both of them are citizens and residents, neither of them being citizens of or residents in Mississippi?

Section 849 of the annotated code provides: "Corporations which exist by the laws of any other state of the union, may sue in this state by their corporate names, and they shall also

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be liable to be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against." The simple meaning of this section is: (1) That foreign corporations may sue in this state, by their corporate names, any person found in this state, in the county of such person's residence, or such corporation may proceed against any nonresident debtor, having property in this state, by attachment, etc.; (2) that foreign corporations shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against. Individual nonresident debtors can only be sued or proceeded against by attachment or garnishment thereunder.

Clearly, it never was the purpose to open the courts of this state to a nonresident claiming a right of action against a tortfeasor residing in the same state with himself, for a wrong done in the state wherein both reside, especially where no reason appears for seeking the tribunals of this state, and especially when the plaintiff has not acquired, and does not even contemplate acquiring, a domicile in Mississippi. If such were the law, every person in the State of Illinois having a grievance against the Pullman Palace Car Company, could seek redress in the courts of this or any other foreign state, without first acquiring citizenship and without showing proper cause for coming to our courts, or without proceeding by attachment. Another effect would be to harass the nonresident foreign corporation with suits remote from its place of citizenship and remote from the place of residence of its witnesses, while it would be deprived of ordinary or compulsory process to compel the attendance of witnesses. Again, such right would contravene a fundamental principle of jurisdiction—one so carefully guarded by § 650 of the annotated code of Mississippi, and so fully provided for in our federal and state judicial systems—the principle which requires ordinary actions to be brought in the county of defendant's residence.

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A careful review of the several decisions of the supreme court of Mississippi, bearing on the question at bar, brings to light no case directly in point. In the case of *N. O. J. & G. N. R. R. Co. v. Wallace*, 50 Miss., 244, the facts are briefly as follows: The plaintiff was a resident of this state. He received injuries in Louisiana, which resulted from a collision of trains. The defendant was regarded as a domestic corporation, and was so treated by the court.

In the case of *Chicago, etc., Railroad Co. v. Doyle*, 60 Miss., 977, the husband of plaintiff was killed by collision of trains in Tennessee. Plaintiff resided in Mississippi. She based her action on negligence said to have been commenced at Water Valley in Mississippi, and which resulted in the death of her husband, an engineer in the employ of defendant. It was claimed that a train dispatcher at Water Valley, in Mississippi, sent a message which was the moving cause of the injury. The court held "the view that no recovery could be had here, except for a result traceable to an omission of duty in Mississippi, is unfounded. Physical force resulting from this state and inflicting injury in another state, might give rise to an action in either state.

In the case of the *Illinois Central Railroad Co. v. Crudup*, 63 Miss., 298, the appellee resided in Mississippi. His son was fatally injured in a collision between trains of appellant in the State of Tennessee, and died a few days thereafter from the effects of the injury.

The plaintiff was a resident of this state, and was invoking the jurisdiction of the courts of this state on the principles of comity. In the case at bar, no question of comity can possibly arise, because all the parties and the wrong were subjects, and exclusive subjects, of the jurisdiction of the courts of Illinois.

In the case of *McMaster v. I. C. R. R. Co.*, 65 Miss., 264, the plaintiff was a citizen of Mississippi. Her son was killed in Louisiana. A demurrer was interposed to the declaration on the ground that her son came to his death by the careless-

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ness and negligence of fellow servants. No question of jurisdiction was involved.

The question presented in the case at bar is founded in the facts that the plaintiff and defendant are both residents and citizens of the State of Illinois; that neither at the time of bringing the action in the circuit court of Claiborne county, Mississippi, nor since, has the plaintiff been a citizen of and resident in the State of Mississippi, nor has the defendant been a citizen of and resident in the said state, Illinois being the state of its creation, and that the jurisdiction of the circuit court of the State of Mississippi is not invoked in good faith. We are not wanting in authorities, however, of other states that deny jurisdiction to a state over torts committed by citizens of another state upon citizens of the same state and within the territorial limits of the same state.

The following authorities maintain our contention: *Kahl v. M. & C. R. R. Co.* (Ala.), 10 So. Rep., 661; *Newhaven Horse Nail Co. v. Linden Springs Co.*, 142 Mass., 349; *Ferguson v. Nelson*, 11 N. Y., 524; *Morris v. Pa. R. R. Co.*, 78 Tex., 17; *Winchester v. Brown*, 13 N. Y., 655; *Gregory v. Lake Erie, etc., R. R. Co.*, 40 N. J., 38; *Central R. R. Co. v. Banking Co.*, 76 Ala., 388; *B. & O. R. R. Co. v. Adams Express Co.*, 22 Fed. Rep., 404.

Question of punitive damages.—Under what facts, conditions, and circumstances can sleeping car companies be held liable in exemplary damages; and can defendant be held liable in exemplary damages, under the disclosures of the record in the case at bar?

“The justification of exemplary damages lies in the evil intent of the defendant, and the allowance of such damages is, therefore, restricted to cases of wanton injury. There must be some wrongful motive accompanying the wrongful act.” *Sedgwick on Damages*, sec. 363; *Reeder v. Purdy*, 48 Ill., 261; *Fornell v. Warren*, 70 Ill., 28; *Toledo W. & W. R. R. Co. v. Roberts*, 71 Ill., 540; *Miller v. Kirby*, 74 Ill., 420; *Becker v. Dupree*, 75 Ill., 167.

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The evolution of the doctrine of damages and exemplary damages, so far as the establishment of rules to govern in the imposition of same, is, indeed, interesting. In the early history of the cases allowing exemplary damages, the court seems to have considered that the placing of the issue upon the country gave the jury unrestrained discretion. The general warrant cases, which are the earliest, were all upheld on this assumption. More enlightened reasoning, however, led to the necessity of putting some restraint upon such arbitrary power. In short, law would be no rule of action unless every claim, demand, or penalty was controlled by some fixed principle.

In applying the doctrine of exemplary damages to master and servant, in modern practice, the rule seems to depend upon the nature of the master with reference to his relation with the servant. Thus, the rule as applied to individual master and servant is different when applied to a common carrier and its servant, the difference, however, being the strictness of the application of the doctrine to the latter class of master and servant.

In fixing the rule making a principal liable in exemplary damages for the acts of his agent or servant, Sedgwick, section 378, citing a large number of leading cases, lays down the rule as follows: "It is the better opinion that no recovery of exemplary damages can be had against a principal for the tort of a servant or agent, unless the principal expressly authorizes the act as it was performed, or approves it; or unless the principal was grossly negligent in hiring the servant or agent, or unless the principal was grossly negligent in not preventing the servant or agent from committing the act." He also states the rule to be: "That the burden of showing authorization or approval by the principal is on the plaintiff." *The Amiable Nancy*, 3 Wheaton, 546; *Grund v. Van Vleck*, 69 Ill., 478; *Becker v. Dupree*, 75 Ill., 167; *Freese v. Tripp*, 70 Ill., 496.

To conclude this branch of the case, we say the record shows that the Pullman Palace Car Company did not authorize the

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act of its waiter nor approve it; that it was not grossly negligent in hiring the waiter, if the waiter actually committed a tort; that it used every effort to ascertain the competency and habits of its waiter; and that there is nothing that shows that it employed or retained the waiter knowing him to be incompetent or knowing him, from bad habits, to be unfit for the position he occupied, and therefore instruction number five granted to plaintiff in no way should have been given by the court.

Question of excessive damages.—The approved rule, as laid down in Webb's Pollock on Torts and Sedgwick on Damages, and as approved by this court in the cases on the subject, and also in the case of *Pennsylvania Railroad Co. v. Kelly*, 7 Casey, 373, is as follows: "If the court is satisfied not only that its own finding would have been different, but that the jury did not exercise due judicial discretion at all, and that the damages given were so extravagant as to make it probable that the jury was actuated by passion, prejudice, undue influence or bias, the verdict should be set aside." There is and can be no contention about the rule applicable to setting aside excessive verdicts of juries. The verdict of the jury in the case at bar was for \$34,666.75. It staggers reason to find anything in the record to sustain such a verdict. If it cannot be found in the record, then it must be found in malice, bias, prejudice, wantonness, undue influence or some other equally as vicious and wrongful moving cause. It is true a remittitur was entered in the court below reducing the judgment to \$15,000, but the animus of the jury was not changed thereby, and the latter sum is grossly excessive.

Miller, Smith & Hirsh, for the appellee.

The right to institute this suit seems to us manifest, and we submit there can be no valid reason offered why our courts should not take jurisdiction. Our statute even expressly confers it, and we contend that the statute does not bear the inter-

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pretation placed upon it by opposing counsel. Code of 1892, § 829.

Absolute and unlimited power is given foreign corporations to sue in this state, and not only are they authorized to sue, but they are authorized, by the express terms of said section, to act through their agents, and said acts shall have the same force and validity as the acts of the agents of private persons, and the only limitation upon their power to transact business in this state (except in the case of insurance companies) is that they shall not do or commit any act contrary to the laws or policy thereof.

But the right of action in this case is of common law origin, and the right to institute suit thereon in our courts exists independently of the statute. *I. C. R. R. Co. v. Crudup*, 63 Miss., 291. This case is placed by its reasoning upon the broad ground taken by the supreme courts of the United States, Minnesota and Kentucky, and expressly repudiates the doctrine of the courts of Ohio, Massachusetts and Kansas, and the case, of course, was one based upon a right of action for death allowed by a foreign statute.

In the case of *Chicago, St. Louis & New Orleans Railroad Co. v. Doyle*, 60 Miss., 977, no such question is raised as that sought to be made by appellant, that the residence of the plaintiff conferred jurisdiction. But this court gave vigorous enunciation to the high principle that, even in actions for a death grounded upon the statutes of foreign states, our courts will maintain jurisdiction because of the coincidence of that statute with ours on this point, and "independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced here when it does not conflict with the public policy of this state to permit its enforcement, and our statute is evidence that our policy is favorable to such rights of action instead of being inimical to them."

In the case of *McMaster v. Railroad*, 65 Miss., 264, no question

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was presented as to the residence of the plaintiff, and although the cause of action arose in Louisiana, yet the right to bring the suit in this state was not even in question, the court evidently regarding the law of this state as settled upon that subject, by its preceding decisions. These three cases are all based upon statutory rights, and, certainly, if we will enforce the statutory right created by the laws of another state, because the right of action is transitory, we will sustain the right of action, transitory in its nature, which is purely of common law origin.

We confess we do not understand why the appellant cites the case of *Railroad Co. v. Wallace*, 50 Miss., for it not only fails to lend any aid to its contention, but strongly vindicates the plaintiff's right to bring this suit. Here is a decision upon a case which was instituted as far back as 1869, and where the injury occurred in another state, and where the defendant, as in this case, plead to the jurisdiction of the court, and which plea, upon demurrer, was held invalid. Judge Peyton, in delivering the opinion of the court, said: "Corporations are artificial persons existing only in contemplation of the law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued like natural persons in transitory actions, arising *ex contractu* or *ex delicto* in any state, where legal service of process can be had."

That plaintiff had a perfect cause of action cannot be successfully denied. It is immaterial whether defendant was a common carrier or not, and neither the original nor the amended declaration alleges it to be a common carrier. Its liability for the acts of its servants, acting within the scope of their employment, is unquestioned. This court, in *Richberger v. Express Co.*, 73 Miss., 161, states the doctrine with great clearness and force.

The Mississippi, New York, and Iowa cases all establish the liability of the Pullman Palace Car Company for the acts of its porter. But as defendant has persistently claimed that this case is to be tried in accordance with the laws of the State of

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Illinois, we are not without the adjudication of that state, defining some of the duties of the Pullman Palace Car Company to its patrons.

We refer to the case of *Nevin v. Pullman Palace Car Co.*, decided by the supreme court of Illinois in 1883, and reported in 11 Am. & Eng. Ry. Cases, 92. As this case was decided by the court of the state which created the defendant corporation, it has an important bearing upon the questions at issue here, and for that reason and for the intrinsic merit of the reasoning of the court, we confidently rely upon it. But in addition to the foregoing cases, which hold, as a matter of law, that the porter represents his company, the testimony in this case conclusively establishes his agency as a matter of fact. The porter, Greenworth, testified that he had charge of the buffet, and attended to the duties imposed upon the other porter. It is therefore beyond question that this porter, or waiter, Greenworth, had full and absolute charge of this buffet, and was, in all respects and for all purposes, the representative of his company.

"The plaintiff may show the defendant's wealth, that the jury may judge what may be a sufficient punishment." *Whitfield v. Westbrook*, 40 Miss., 311.

In the case of *Smith v. Wunderlinch*, 70 Ill., 446, the court says: "Where exemplary damages are awarded in an action of tort, the pecuniary circumstances of the defendant may be considered, not to show that he is able to pay, but with a view to such damages as may be punishment."

WOODS, C. J., delivered the opinion of the court.

This action was instituted by appellee, in the circuit court of Claiborne county, Mississippi, against appellant for the recovery of fifty thousand dollars, for personal injuries alleged to have been wilfully and wantonly inflicted upon appellee by one of the servants of appellant, employed as a waiter upon the sleeping car of appellant, in which appellee was being transported from Chicago, Ill., to New Orleans, La.

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The complaint of appellee was filed in said court on January 2, 1896, and a summons duly issued, and duly executed by service upon a conductor of appellant, in the town of Port Gibson, in said county. The amended declaration is in these words, viz.: "Trueman P. Lawrence, a citizen and resident of the State of Illinois, complains of the Pullman Palace Car Company, a corporation existing under the laws of the State of Illinois, and a citizen of said State of Illinois, in an action of trespass on the case. For that whereas, heretofore, to wit, on or about the twenty-fifth day of October, 1895, the said defendant, being then and there engaged in running a line of sleeping cars over the line of the Illinois Central Railroad, between the city of Chicago, in the State of Illinois, and the city of New Orleans, in the State of Louisiana, and furnishing seats, berths, sleeping accommodations and lunches and other refreshments, such as are furnished by sleeping car companies for pay and reward in that behalf; and that, on the day and year aforesaid, the said plaintiff, being a passenger on said Illinois Central Railroad for the city of New Orleans, and entitled to travel as a first-class passenger on said railway company's line, entered one of the cars of said defendant at Chicago, Illinois, engaged his berth and paid the defendant the price thereof from said city of Chicago to said city of New Orleans; and it then and there became the duty of said defendant and its employes to secure the comfort and safety of said plaintiff, and protect him from injury or wilful misconduct of any of its employes; yet the said defendant and its employes did not secure the comfort and safety of said plaintiff, or protect him from injury or the wilful misconduct of said employees, as aforesaid, but, on the contrary, one of the employes of said defendant—to wit, the colored porter employed by said defendant, and who was then and there in charge of the buffet of said defendant—while in the discharge of his duties as the employe of said defendant, did wantonly, wilfully, and maliciously injure and damage said plaintiff, in this—that is to say, about 10 o'clock

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at night, on the day and date last aforesaid, plaintiff, then and there occupying the smoking room of said sleeper in company with one David Henderson, and being the only occupants of said compartment, inquired of said Henderson if he thought he could get a sandwich at that hour of the night, and said Henderson replied he thought he could, and he then rang the bell for the porter, who failed to appear, and, after waiting some time, he rang again, and, finally, the said employe of said defendant, whose name, as plaintiff afterward learned, was C. H. Greenworth, appeared, having the linen for his bed, which he angrily threw down on a seat; whereupon plaintiff said to him, in a polite manner: "Porter, could we have, or, is it possible for us to get a sandwich at this hour?" He then and there answered, "No. I am tired of being imposed upon at this time of night; I am going to bed," or words to that effect, his manner being exceedingly rude and offensive. Mr. Henderson then spoke to him quietly, saying, "Why can't you answer the gentleman civilly?" Whereupon the said porter said to him, "You go to hell!" Plaintiff then quietly asked him for his name, saying that he would report him to the company, his employer. The porter then said, "My name is C. H. Greenworth. You can report and be damned. You have got my temper up now, and I will just mash you both;" and, turning to plaintiff, shook his fist in his face and said, "I will kill you!" He then struck the plaintiff with his fist savagely. The first blow knocked off the eyeglasses of plaintiff, by which he was rendered absolutely helpless, and he sat there not daring to move, the attack being sudden and violent. At this juncture the said Henderson started quickly to call the conductor, when the said porter, Greenworth, seeing his movement, caught the ventilator stick belonging to the car, and, as said Henderson passed into the passage leading into the body of the car, struck him with it, and then turning to the plaintiff, still sitting, struck him with said stick, and then raised the stick for the purpose of striking again, when

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two other porters, in the employ of said Pullman Palace Car Company, came to his rescue and pulled him off.

Plaintiff then further avers that said attack of said porter was wanton, wilful, malicious and utterly unprovoked by any act or word of plaintiff, and was made while the porter was in the employment of the defendant, while discharging the duties of said defendant, and while acting in the scope of his employment. Plaintiff avers, also, that he was greatly shocked in his nervous system and was injured by said blows, and that he has suffered great pain and bodily and mental anguish, and has been permanently injured in his health, and that he has been deprived of the means of continuing his usual occupation, and is thereby utterly unable to earn a livelihood, and that but a short time before the said assault, he was able to earn, and did earn, from \$2,000 to \$3,000 a year.

The defendant first pleaded to the jurisdiction of the court, because the wrong and injury complained of occurred wholly in the State of Illinois, and not in the State of Mississippi, and because the plaintiff and the defendant were, at the time of the bringing of the suit, and still are, citizens of and residents in the same State of Illinois. To this plea to the jurisdiction plaintiff demurred, and the demurrer was sustained and leave was given defendant to plead to the merits.

The defendant then filed the general issue, and gave notice thereunder that it would prove the following affirmative matter in avoidance of the action, viz.: “(1) That said plaintiff committed an assault and battery upon said porter of said defendant, unprovoked and while said porter was in the discharge of the duties for which he was employed; (2) that plaintiff was drunk and disturbing the peace on the car of the defendant, and making threatening and hostile demonstrations towards the porter of defendant; (3) that plaintiff was drinking and using profane and offensive language on the car of defendant and towards the porter on said car of defendant while the porter was in the discharge of his official duties; (4) that plaintiff

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suffered no injury whatever from defendant, and that no harm whatever was done to him, physically or otherwise, by the said porter of defendant, as charged in the declaration; (5) that the plaintiff commenced drinking excessively and continuously from the time when defendant's car, in which plaintiff was riding, left Chicago up to the time that the alleged difficulty took place, . . . and that said difficulty was provoked by and through the wrongful actings and doings of plaintiff."

This notice of special matter was amended by defendant as follows: "The plaintiff, who was riding in the smoking compartment of defendant's sleeper, after the hour for retiring, said compartment being set aside for the use of the employes of the company after ten o'clock at night, asked the waiter in said sleeper for a sandwich, and that the waiter informed him (plaintiff) that he could not serve the sandwich in the smoking compartment after ten o'clock at night, as it was against the rules of the company, the said compartment being set aside, as aforesaid, for the use of the employes of defendant after said hour; but that said waiter offered to serve the same in the body of the car; whereupon plaintiff declined to have it served there, and insisted on having it served in the smoking compartment."

The declaration has been set out by us because, by reason of its extraordinary fullness, precision, and clearness in averring the facts on which plaintiff bases his cause of action and his right of recovery, little or no reference need be made by us hereafter in this opinion to the evidence offered to support plaintiff's complaint, it being sufficient to say that every material averment of the pleading was abundantly proved by the plaintiff and his companion, David Henderson, in the evidence, and this evidence the jury has found to be true. As to the evidence offered by defendant, under its notice filed with its plea of the general issue, it is enough to say that the jury did not accept it as true in any of its vital phases, and we see no reason for disagreeing with the jury on the facts. The very serious and permanent character of the injury received and suffered by

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plaintiff, was shown by the expert and other evidence, and it can hardly be said that the defendant seriously attempted to controvert this testimony.

It is indisputable that the system of rules which the defendant has adopted for the government of its servants in the discharge of their duties, and for the guidance of the traveling public using its sleeping and buffet cars, are communicated to the servants by oral instructions only, which are given from time to time by superior agents of defendant, and that neither on its bills of fare, nor on any printed notices or posters, nor in any other manner, except as advised by defendant's employees in specific instances, are these rules brought to the knowledge of those being carried on defendant's cars. It would seem to be an unheard-of requirement to demand obedience to the defendant's rules, when those rules are not published and are not known to travelers who are to be guided by them. But we do not dwell upon this in the present case, because we regard this question as to the operation and effect of such rules as of trifling concern in the case before us, on its other facts.

We proceed now in an orderly manner to consider some of the questions of law presented for determination by the appellants' assignment of errors. 1. It is assigned for error that the court below erred in sustaining plaintiff's demurrer to the plea to the jurisdiction filed by the defendant.

Until the hearing of the able and exhaustive oral argument of appellant's counsel in support of this assignment, we had supposed there was, in our own state, no ground left for dispute that, in transitory actions, whether in tort or on contract, our courts were wide open to any suitor, resident or nonresident, against his adversary, whether resident or nonresident, whether a natural person or an artificial one, regardless of where the right of action occurred, if only the courts had jurisdiction of the subject-matter, and could obtain jurisdiction of the party, either by a voluntary appearance, or by service of process. We are aware that there is some divergence of opin-

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ion on this subject between the courts of last resort in this country, and that apparent authority can be found for holding that a foreign corporation resident in one state may not be sued in another state by a resident of the first state on a cause of action arising in the first state. But even these cases will be found to be governed by the peculiar statutes of the state declining to take jurisdiction, or that the refusal to take jurisdiction rested upon some unusual circumstances which deterred the court from entertaining the suit, or because of a supposed distinction between statutory rights and common law rights. But in many states, and amongst them our own, the rule we first announced has been firmly established by repeated adjudications. The rule was first expressly declared in our own state in the case of the *New Orleans, Jackson & Great Northern Railroad Co. v. Wallace*, 50 Miss., 244. That was an action brought by Wallace against the railroad company, a foreign corporation, in one of the courts of this state, for the recovery of damages for injuries sustained by him in a collision of trains in the State of Louisiana. The court said then, on this very question: "Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state. But they are liable to be sued, like natural persons, in transitory actions arising *ex contractu* or *ex delicto*, in any state where legal process can be had. . . . In transitory actions, foreign private corporations, like natural persons, may be sued anywhere where the court can obtain jurisdiction of the corporation either by legal service of process or its appearance by attorney." Whether Wallace was a citizen of or resident in Mississippi nowhere appears in the reported case, and that fact must have been thought by the court to be wholly immaterial to a proper determination of the question of the amenability of a foreign corporation, for a wrong done in a foreign state, to the jurisdiction of our courts.

This same question was again presented to and considered

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by this court in the case of *Chicago, St. Louis & New Orleans Railroad Co. v. Doyle*, 60 Miss., 977. This was an action brought against a foreign corporation for an injury in a foreign state, and recovery sought under the statutes of Tennessee, the state where the injury occurred. Campbell, C. J., in delivering the opinion of the court, used this language: "The right of action for damages for killing a husband, by the statute of Tennessee, may be asserted in the courts of this state because of the coincidence of the statutes of the two states on this point, and, independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced here when it does not conflict with the public policy of this state to permit its enforcement." In this case, too, it nowhere appears that Mrs. Doyle was a citizen of or resident in this state, and that was treated by the court as immaterial. The jurisdiction of our courts in such cases was placed upon the broad ground that a right of action created by the statute of another state, if of a transitory nature, may be enforced in the courts of this state if not in conflict with our public policy.

Again, in the case of *Illinois Central Railroad Co. v. William Crudup, Admr.*, 63 Miss., 291, this question was considered and decided. The facts were that George A. Crudup, an unmarried son of William Crudup, administrator, was fatally injured in a collision of trains in Tennessee. The father of the young man thus fatally injured was, by the statutes of Tennessee, sole distributee and next of kin. The father took out letters of administration upon the estate of his son in this state, and brought his action to recover the damages sustained by his son, and for damages which he sustained as next of kin. Cooper, C. J., delivered the opinion of the court, and said: "It is contended by appellant that suit cannot be brought in this state by an administrator appointed here, because, as is said, the statute of Tennessee cannot operate extraterritorially, and cannot, therefore, confer a right upon an officer

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appointed by the courts of this state, and that our statutes giving actions under similar circumstances do not recognize the administrator as the proper party to sue. The proposition contended for is sustained by the courts of Ohio, Massachusetts, and Kansas. But the supreme courts of the United States, of Minnesota, New York, and Kentucky hold the contrary view, and, as we think, with better reason." And the jurisdiction of our courts was sustained, and the right given by the law of Tennessee held enforceable in our courts even though that law was unlike our own. Here, too, the record does not disclose the residence of the administrator who brought that suit, and counsel for appellant are mistaken when they assert that the administrator in that case was a resident of Montgomery county, Mississippi. The right to resort to our courts was not based upon the plaintiff's citizenship or residence, but upon the high ground of affording a remedy in our courts for a right of action created by the law of a sister state.

In the still later case of *McMaster v. Illinois Central Railroad Co.*, 65 Miss., 764, the facts were that a son of Mrs. McMaster, the plaintiff, was killed by the negligent running of a train of cars of a foreign corporation in the State of Louisiana, and the question of jurisdiction was not at all referred to by counsel, and, of course, not adverted to by the court. The conclusion which we draw from this significant silence is, that the able counsel in that case for the railroad, who were also counsel for the railroad in the Wallace, Doyle, and Crudup cases, *supra*, had concluded that it was idle to longer "kick against the pricks," and, recognizing the rule in question as at last thoroughly established in this state, wisely forbore the renewal of a hopeless contest.

To the cases referred to by Cooper, C. J., in delivering the opinion of the court in Crudup's case, as holding the view supported by better reason, may now be added many others. Many of the authorities are collected in the case of *Burns, Admr., v. Grand Rapids, etc., Railroad Co.*, 113 Ind., 169.

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We content ourselves by reference specially to the cases of *Knight v. West Jersey Railroad Co.*, 108 Pa. St., 250, and *Eingartner v. Illinois Steel Co.* (Wis., decided October, 1896), 34 L. R. A., 503.

Said the supreme court of Pennsylvania in the former case: "We think the weight of recent and better considered adjudications in this country decidedly favors the application of the same rule to all transitory actions for injuries to persons or property, whether recognized by the common law or created by statute to meet new exigencies of modern life, unless such statute is contrary to the policy of the laws of the state where the action is brought. The claim of comity on which the rule is founded, is as urgent in the one case as the other. . . . As a general rule, neither citizenship nor residence is requisite to entitle a person to bring suit in Pennsylvania. A court having jurisdiction of the subject may acquire jurisdiction of the person by lawful service of its process. If a defendant were not liable to answer in a civil action in any state where he may be found, he could easily evade service of process. A preliminary inquiry respecting the citizenship or residence of the parties could not advantage the public." This very satisfactory reasoning applies perfectly to the case now before us; for, in Mississippi also, "as a general rule, neither citizenship nor residence is requisite to entitle a person to bring suit" in our courts.

In the latter of the two cases just hereinbefore referred to by us, that of *Eingartner v. Illinois Steel Co.*, 34 L. R. A., 503, the identical question pressed upon us was urged upon the Wisconsin supreme court. Winslow, J., who delivered the opinion of the court in that case, said this question arises, viz.: "Whether the court could, in its discretion, dismiss the case because the parties were both residents of the State of Illinois, and because the cause of action arose in the State of Illinois, jurisdiction of the person having been obtained within this state," and the court proceeds to answer the question in the

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negative. To guard against any possible misconstruction, we desire to say that we think the concurring opinion of Cassaday, C. J., states the true ground for the conclusion reached by the court in Eingartner's case.

Independently of all adjudications on this subject, however, jurisdiction of the present case was properly taken by the court below under a positive statute of this state. Code of 1892, § 849 (which is found in our former codes of 1880, 1871 and 1857, though not called to the attention of this court by counsel in any of our former cases in which this question was considered), is in these words, viz.:

"849. *Of foreign corporations.*—Corporations which exist by the laws of any other state of the union, by the acts of congress, or the laws of any foreign state, may sue in this state by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against," etc.

By this statute our courts are thrown wide open to foreign corporations, and they are made liable to suit just as individual nonresidents are. They may be proceeded against by attachment, in proper cases, just as individual nonresidents are liable to be proceeded against, or, if legal process can be served on them in this state, they may be sued in any other appropriate form of action, just as individual nonresidents who may come into this state and be legally served with process may be sued in any appropriate action. The statute is so brief, plain and simple that it bears its meaning on its face and carries its own interpretation in its own language. We are of opinion that the demurrer to the plea to the jurisdiction was properly sustained.

We now proceed to consider the law of the liability of the appellant in the present case. We need hardly say that the law of the State of Illinois is that to which we must look to ascertain whether a cause of action is shown and to determine

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the extent and measure of the recovery sought, if appellee was entitled to recover at all. We do not understand that counsel for appellee make any dissent whatever to this proposition. It must be conceded, further, that the Pullman Palace Car Company is not technically a common carrier in the State of Illinois. Our constitution has wisely declared all sleeping car companies common carriers, but such is not the law of Illinois. In Illinois, as in many other states, sleeping car companies are regarded as nondescript corporations *sui generis*. By these authorities they are said to be neither common carriers nor innkeepers. And yet they bear some marked resemblance to both. They are under the duty of not only furnishing seats in their cars to all proper persons applying therefor, but they are also under obligation, in all proper cases and to the extent of their ability and capacity, to furnish sleeping accommodations and food to the traveling public, for proper compensation. They, therefore, seem to possess some of the characteristics of innkeepers. And they seem to be *quasi* common carriers. They own and use railway cars, affording many comforts, conveniences and luxuries unknown to first-class ordinary cars of railroad companies, and these cars are to be used in the transportation of passengers from point to point, and the general traveling public is invited to become patrons of the company owning and using these luxurious coaches. The company is in some sense engaged in transportation, and its business is with the general public. It is unlike the private carrier, who may select his own customers, for it must take all who are proper persons, and who pay the demanded fare. So, though not technically a common carrier in Illinois, it bears marked resemblance to the common carrier, and must be held to the performance of its appropriate duties in its business intercourse with the traveling public. See the well-considered opinion on this subject in the Illinois case of *Nevin v. Pullman Palace Car Co.*, 106 Ill., 222. Giving these observations, which are thought to be just, their due weight, let us consider as briefly as possible the liability of

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the appellant under the law of Illinois, on the case made herein by the appellee's evidence, which the jury has accepted as true. That the master in Illinois is liable in compensatory damages for the wrongdoing of his servant committed while engaged in the master's business and in the scope of his employment, is not disputed. The contention of counsel for appellant is that, under the law of Illinois, vindictive damages are not recoverable against the master in such cases, unless it is further made to appear that the master directed, participated in or ratified the wanton and malicious act of his servant. It is argued that vindictive damages are in their nature penal, and that no one should be held liable to punishment unless the act complained of is his own act, made so by his authorization or ratification of it when committed by the servant, and that it is illogical for the courts to do anything punitive in character unless the master is directly and personally responsible for the very act complained of. The sufficient answer to this contention is that the judge-made law of punitive damages is not the result of logic, but of public necessity, as text writers and courts have repeatedly shown. If corporations—artificial beings who can act only through agents and servants in their varied and multitudinous and constantly recurring business dealings with the public—can never be held liable in punitive damages for the acts of their servants unless expressly authorized by them, or unless expressly ratified by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages, will ever again be awarded against corporations. Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct. Having, by the constitution of their being, to act solely by agents or servants, they must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the master's business and in

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the scope of their employment, and this to the extent of liability for punitive damages in proper cases. This, as we understand the utterances of the supreme court of Illinois, is the settled law of that state.

The counsel for appellant place great reliance upon the decision of the supreme court of the United States in the case of *Lake Shore & Michigan Ry. Co. v. Prentice*, 147 U. S., 101, and that case is apparently authority for appellant's contention on this point. The gist of the decision in that case is concisely stated in its syllabus, and is in these words: "A railroad corporation is not liable to exemplary or punitive damages for an illegal, wanton, and oppressive arrest of a passenger by the conductor of one of its trains, which it has in no way authorized or ratified."

That case was brought in the circuit court of the United States for the northern district of Illinois, by Prentice, for the recovery of damages for the wrongful acts of the railroad's conductor, and the facts disclose a most outrageous wrong done Prentice by the conductor in charge of the train, while engaged in the company's business and within the scope of the conductor's employment. Yet, as we have seen, the United States supreme court held the railroad company not liable for punitive damages, because it had not authorized the conductor's shameful conduct nor ratified it afterwards. In the opinion of the court, reference is made to three Illinois decisions as support for the ruling of the United States supreme court. But a critical examination of those cases will demonstrate that the supreme court of the United States not only misconceived the views of the Illinois supreme court in those cases, but overlooked the many other Illinois cases which distinctly hold the contrary. The cases cited by the supreme court of the United States in support of its holding that authorization or ratification by the principal of the wrongful act of the agent or servant is a prerequisite to recovery of punitive damages, are *Grand et al. v. Van Vleck*, 69 Ill., 478; *Becker v. Dupree*, 75 Ill., 167;

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and *Rosenkrans et al. v. Barker*, 115 Ill., 331, and, in our opinion, are not in point and do not support the position of the United States supreme court. We think our opinion will be abundantly shown to be correct by an examination of the cases themselves. They are all cases in which punitive damages were sought to be recovered against a private person on account of the act of an agent charged with a single specific duty, in cases where the agent, without any authority, did that which he was not directed to do.

On the other hand, the supreme court of Illinois has distinctly held, with courts elsewhere, in the case of the *Singer Mfg. Co. v. Holdfodt*, 86 Ill., 455, that "a corporation may be liable to vindictive damages for the wrongful act of its agent, perpetrated while ostensibly discharging duties within the scope of the corporate purposes," as shown by the syllabus. Said the court, page 459: "It is contended that appellant, being a corporation, cannot be made to respond in vindictive damages unless the wrongful act was authorized or approved by the corporation. This is not in accordance with the ruling of this court. Ever since the decision in *St. Louis, Alton & Chicago Railroad v. Dalby*, 19 Ill., 353, it has been regarded as settled law that if the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages, and that a person openly and notoriously exercising the functions of a particular agency of a corporation, will be presumed to have sufficient authority from the corporation so to act."

In the case of *Toledo, Wabash & Western Railway Co. v. Harmon*, 75 Ill., 298, the Illinois court said, on this point: "It is, however, contended that if the engine driver did the act wantonly or wilfully, it was outside of his authority, and, hence, the company is not liable for the damages resulting from the misconduct of the engineer. He was their servant, was engaged in the performance of the duty assigned to him, and if,

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while so engaged, he used the engine put into his possession and under his control, to accomplish the wanton or wilful act complained of, why should not the company be held liable? It is said that he was not employed for that purpose, nor directed to perform the act; and it is equally true that they do not employ engineers to inflict injuries through negligence or incompetency, and yet these bodies are held liable for such acts of their servants." And this strong language was employed in a vindictive damages suit.

Many other Illinois cases might be cited to show that direct authorization or express ratification of the servant's wilful or malicious act by his master is not prerequisite to the imposition of punitive damages upon the master, in proper cases, but repetition is burdensome and unnecessary. There is one more case which it will be profitable to notice—that of *The Pullman Palace Car Co. v. Reed*, 75 Ill., 125. For brevity's sake we quote from the syllabus: "Where the expulsion of a passenger from a sleeping car is done under a mistaken sense of duty, and the facts do not show it was done wilfully, maliciously or wantonly, so as to justify the imposition of exemplary damages, the damages awarded should, in some degree, be proportionate to the magnitude and character of the wrong actually done." Here is a clear recognition of the true rule on this subject, and announced in a case where appellant here was appellant there. It would appear to be a vain thing to look further into Illinois reports to ascertain what the law of appellant's liability is in such cases as the one before us.

But, if the rule contended for by appellant's counsel were the true rule, the appellant would not be protected by it, for there was virtually ratification of the wanton assault of the porter. He was not discharged because of any disavowal of his act, but under a general rule of the company, by which every servant of the company who was so unfortunate as to have a personal difficulty with a passenger, whether necessarily or unnecessarily, rightfully or wrongfully, was required to

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leave the service of the company—a rule as unjust as heartless in those cases where the difficulty was unavoidable. Not only was there no disavowal in the discharge of the porter, but the company has made strenuous effort to prove that the act of its servant was neither wilful and wanton, nor even improper and wrongful; and to the vicious assault on the person of appellee, the company, on trial below, made an unwarranted and violent attack upon the conduct and character of appellee, and all this after the company knew, from its own conductor's report of the porter's assault, what the facts were connected with that assault. So, if the rule thought by learned counsel for appellant were the true one, the appellant's ratification of its servant's act might fairly be said to be clearly shown.

Along this line of thought it is becoming now to say that, looking at the Illinois cases already cited and quoted from, it is clear that, under the Illinois law, the porter who made the assault upon appellee was at that time engaged in the company's business, and was acting within the scope of his employment. And if he was not, it is difficult to imagine a case where a servant, committing a wanton and wilful wrong, could ever be said to be acting within the scope of his employment. He was the waiter, charged with the duty of attending the calls of passengers and of serving food; he did go into the smoking compartment in answer to repeated calls for his attendance; and he did make this brutal assault in the course of the interview had with him by appellee and his traveling companion, Henderson, in their effort to have food supplied appellee. In addition to the Illinois cases already referred to, see *Chicago, Burlington & Quincy Railroad Co. v. Sykes, Adm.*, 96 Ill., 162, in which it is held that though the wrongful act complained of may be said to be outside of and beyond the duty of the servant, still, unless it was disconnected from the business of the company, the company was liable, because the servant was acting within the scope of his employment.

The second and third assignment of errors may be consid-

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ered together, as they call in question the action of the court in refusing to suppress six interrogatories propounded by appellee to appellant and the answers thereto, and in permitting this evidence to go to the jury. These questions were propounded with the view of showing the financial condition of the appellant, as punitive damages were sought to be recovered, and the case was one which, on its facts, was peculiarly for the determination of the jury. The counsel for appellant do not deny the general rule of law that the wealth or pecuniary condition of a defendant may be shown with a view to enabling the jury to inflict proper damages by way of punishment. Indeed, this is well settled both by our own reports and by those of Illinois, as well as generally by text writers and courts of last resort. See Sedgwick on Damages, vol. 1, sec. 385, and the cases there cited. See, also, on this point, *Smith v. Wanderlich*, 70 Ill., 426. The specific objection urged by appellant's counsel to this action of the court below is that the course of this particular examination involved an exposure of the defendant's dealings with its stockholders, but that cannot be said to have been the object of the method of examination adopted to inform the jury of defendant's pecuniary condition. True, the plaintiff might have asked the proper officers of the company what its actual condition was, but we see no valid objection to have this shown in another, and perhaps for plaintiff's purpose, a safer mode of bringing the financial condition of defendant to the jury's attention. We are at a loss to conjecture how it was impertinent and incompetent to ask defendant: 1. The entire paid-up capital stock of the company; 2. What its liabilities were; 3. What are the assets of the company? 4. What was the surplus of the company over and above liabilities? 5. What dividends had been paid stockholders for five years past, and how they were paid. The result of these few questions was to see what the real pecuniary condition of the company was, and the course taken to that end was both simple and natural, and was, as it occurs to us, unobjectionable.

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The eighth assignment of error is to the effect that the trial court permitted the counsel for appellee to indulge in some improper remarks in the concluding argument. It is unnecessary to set out these remarks in this opinion. By the bill of exceptions we are advised that "during all the argument of counsel for plaintiff [including, of course, the objectionable remarks], defendant's counsel was present and heard the same, and made no objection thereto; did not ask the court to stop counsel for plaintiff, nor inform the jury that such argument was improper; hence, the court took no notice of the same. The remarks of the counsel were not taken down and presented to the judge during the term of the court, but were presented to him nearly thirty days later. It being now impossible to give the exact words used during the argument, I [the trial judge] have given the substance of same, as near as I can remember, not claiming that it is absolutely correct."

This assignment, on the facts thus disclosed, must fail, under the authority of the case of *Cartwright v. The State*, 71 Miss., 82, unless we shall be satisfied that there was a most extreme and intolerable abuse of the advocate's privilege. If improper remarks are made by counsel, it is the duty of the court to interpose; but if the court fails to do so, it is the duty of opposing counsel to call the attention of the court to such impropriety, and thus have the proper corrective then and there applied. If counsel fail to thus give the trial court an opportunity to undo any wrong that may have been committed, we will not correct here, except as stated, in cases of extreme and intolerable abuse of the advocate's privilege.

Was there such abuse here? We think not. The remarks of appellant's counsel, first indulged, not unnaturally provoked the retort of appellee's counsel to which objection is now taken, and that they had a "Roland for an Oliver" was, if improper, not surprising, and we do not think it such an intolerable abuse of counsel as will authorize a reversal by us.

We content ourselves by saying that all the assignments of

 Syllabus.

error as to the court's action in giving and modifying and refusing instructions are without substantial merit. The law was fairly, not to say favorably, given for appellant in its charges, and it is without solid ground of complaint as to the instructions. We have carefully considered more than once, every charge to be found in the record, and we find no reversible error in the court's action in this particular.

The damages awarded are large, but we are not prepared to hold that, considering the circumstances of insult and outrage suffered by appellee at the hands of appellant's servant, and the serious and permanent character of the injury received, they are excessive. Every case must depend largely upon its own facts, and as there is no fixed standard for measuring either compensatory or vindictive damages, in cases like this one, the amount of such damages must be left, in great measure, to the good sense and sound judgment of the jury, under proper instructions from the court. We repeat, on all the facts of the case, we do not feel authorized to disturb the judgment because of its excessiveness.

Affirmed.

74	810
478	975

BUILDING & LOAN ASSOCIATION OF JACKSON v. BENJAMIN J.
LEONARD.

BUILDING AND LOAN ASSOCIATION. *Withdrawal of member. Settlement. Usury.*

Where a borrowing member of a building and loan association withdraws from and makes a settlement with it, and is credited, as his share of the profits, with the unearned part of the premium bid by him and with a sum as dividend on his stock, including interest charged him and his fellow members, he cannot recover from the association, as usurious, interest charged on premiums; and he is bound by a settlement made by him which was voluntary and in which nothing was concealed from him.

Brief for appellant.

FROM the chancery court of Hinds county, first district.

HON. H. C. CONN, Chancellor.

The facts are fully stated in the opinion.

Nugent & McWillie, for the appellant.

The question in this case was adjudicated in the case of the *Natchez Building & Loan Association v. Shields*, 71 Miss., 630. There, as here, there had been a settlement, and the former member, after receiving as much or more than he was entitled to, getting a rebate on the premium paid, and also the valuation of his stock, as augmented by like transactions with his fellow-members, proceeded upon a mistaken idea that the decision in the Sullivan case (70 Miss., 94) would allow a recovery of the interest paid on the premium in every state of case. This court failed to see the merit of his claim, and, in disposing of the matter, gave two reasons for its conclusion. One was, that the plaintiff failed to show an usurious contract; the other was, that "on repaying his loan and withdrawing from the association, he voluntarily made the settlement plainly showed in the record, and this he did with full knowledge of all the facts." The court says further: "In this voluntary settlement he made no mistake of fact; he has received subsequent enlightenment of law, as he now supposes. In this voluntary settlement, made with his eyes wide open, he received seventy-two one-hundredths of the premium bid by him, which was returned as unearned, and he received his share of all the profits made by the association during his membership and while employing the money loaned him, and these profits embraced his ratable part of all interest paid by all borrowing members, himself and others. In that settlement he took as his own his part of all interest now supposed to have been usurious, and now holds it. A peremptory instruction for defendant should have been given." It would seem that this decision ought to admonish the appellee that the courts could not recognize this claim, but it is hard to silence those who repeat the cry of the daughter of the horse-leech.

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The lower court, in its decree of reference, directs an accounting upon a basis that leaves out of consideration some of the factors necessary to a correct ascertainment of the status of appellee's demand, conceding, for argument's sake, that he was entitled to an accounting. The settlement is wholly ignored, and no direction is given as to the matter that entered into that settlement, as rebate on premium, withdrawal value of stock, etc. As shown by the testimony of the witness Buck, and exhibits thereto, the appellee had received as much, if not more, than he was entitled to.

No counsel for appellee.

WILLIAMSON, Special J., delivered the opinion of the court. This appeal is from the chancery court of the first district of Hinds county. Leonard subscribed for six shares of the first series of stock in the Building & Loan Association of Jackson. The par value of each share of stock was \$200. On June 10, 1886, he borrowed from the association \$800 at a premium of 35½ per cent., which netted him \$516 in cash, and executed his obligation to pay \$800 and secured said obligation by trust deed on property in the city of Jackson. Again, on August 13, 1886, Leonard borrowed from the association the further sum of \$400 at a premium of 26 per cent., netting him the sum of \$296 in cash, and executed his obligation to pay \$400, secured by a second trust deed on the same property embraced in the first. So that on the two loans Leonard received in cash \$812 and obligated himself to pay the association \$1,200 and interest thereon at 8 per cent. per annum, payable in monthly installments. The contract also bound Leonard to pay monthly on each share of his stock \$1, making a monthly payment of \$6 on all his shares, and stipulated that a default in the monthly payments of dues and interest should subject him to the payment of a fine for each default, the fine to be imposed under the rules and regulations of the association.

Leonard made all his payments of dues and interest monthly,

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from the time he effected the loans until the month of April, 1892, except in the months of September, November, and December, 1890, and the months of January and February, 1891, he failed to pay promptly, and paid for such defaults \$1.40 each month. In the month of April, 1892, Leonard defaulted and never paid again, either the dues or interest, and was fined, under the rules and regulations of the association, \$1.40 each month until December, 1892. On December 13, 1892, Leonard, through his brother, who acted as his agent in the matter, made a settlement with the association and withdrew his membership. The following statement was rendered to Leonard by the association, and on it the settlement was made:

B. J. LEONARD IN ACCOUNT WITH BUILDING & LOAN ASSOCIATION
OF JACKSON.

<i>Dr.</i>	
To loan	\$1,200 00
To interest and fines	123 20
	<u>\$1,323 20</u>
<i>Cr.</i>	
By stock	\$ 522 00
Dividend on stock	276 00
Premium rebate	31 24
Cash to balance	493 96
	<u>\$1,323 20</u>

The bill was filed to set aside this settlement and to recover from the association the usurious interest which complainant claims was collected from him in said settlement in the way of interest charged on the premium of \$388 and the fines that were charged against him, the bill of complaint alleging that no fines should have been charged against complainant, for the reason that the association had on hand money belonging to him which had been collected in the way of interest on the premium.

After setting forth the amount of interest on the premium, and the amount of fines collected from him by the association, complainant sets out in his bill the settlement made December

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13, 1892, and with reference to it makes the following averments: "Your orator now states and charges the fact to be, that, at the time of making said settlement, the association was indebted to your orator in the sum of \$300, or thereabouts, above set forth, and that he, your orator, was unaware of the fact, and that the sum so due him was not allowed him in said settlement so made, is a fraud upon him, and he should be credited with said sum." This is the only allegation in the bill charging fraud, concealment, or mistake in the settlement.

The proof shows that the settlement was made openly, with full opportunity to complainant or his agent to know exactly what he was charged with, and with what he was credited in said settlement. In the settlement Leonard was charged with \$1,200, being the actual amount of cash loaned him, and the premium at which he bid it in. To this was added the sum of \$123.20, being interest and fines which had accumulated after he quit paying according to his contract. He was credited as follows:

Amount of dues paid on his stock.....	\$ 522 00
Amount of dividends on stock.....	276 00
Rebate unearned premium.....	31 24
Cash paid to settle the balance.....	493 96
	<hr/>
	\$1,323 20

The chancellor referred the cause to a commissioner, to compute and state to the court the amount of interest actually collected from complainant, and the amount of interest at ten per cent. on the cash actually borrowed by complainant, to strike a balance between the two, and to report the same. The commissioner made calculation of interest for six years six months and five days, and made his report as directed, and showed a balance of \$96.97 in excess over ten per cent. actually paid. Defendant excepted to said report (1) because the report in nowise showed the state of accounts between the complainant and defendant; (2) because the report does not recognize the settlement had between the parties; (3) the report is only a statement of the interest account between the parties; (4) other

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grounds to be shown, etc. The exceptions were overruled, and a decree entered in favor of complainant for the balance shown by said report, and the building and loan association appealed.

The order of the lower court referring this cause to a commissioner, ignores the contract between the parties, and disregards the settlement had between them on December 13, 1892, when appellee withdrew from the association, and paid the balance then claimed against him. The order of reference dealt only with the question of interest, and excluded every other element of the contract from the consideration of the commissioner in making the calculation directed by the court. The contract may have seemed a hard one to Leonard when he decided to withdraw his membership, and to have the settlement which was made, but it was binding on him and the association in all particulars, except that the association could not enforce against him so much of the contract as required interest to be paid on the premium. Whatever may have been paid by Leonard in the way of interest on the premium, should have been credited to him, in addition to his other legal credits, when the settlement was made. *Sullivan v. Loan Association*, 70 Miss., 94; *Goodman v. Loan Association*, 71 Miss., 310; *Loan Association v. McElroy*, 72 Miss., 441.

According to the facts disclosed in the record, if Leonard, at the time he made the settlement now complained of, had been charged with the money borrowed and interest on it, with the fines which could properly have been assessed against him for failure to make monthly payments and with the premium at which he had bid in the money, and then been credited with all his payments, with the interest paid on the premium and interest on that, and with the fines charged against him and interest on them, it appears that he paid the association, when he settled with it, something less than he might legally have been charged with. Moreover, Leonard was a borrowing member of the association, and withdrew from it, making a voluntary settlement in which he was allowed the unearned

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part of the premium bid by him and \$276 of dividends on his stock, which was his share of the profits, in which profits was included interest charged him and other members on premiums. After having received, in the voluntary settlement made by him, credit for such dividends, he cannot now recover, as illegal and usurious, interest charged him on his premium. *Loan Association v. Shields*, 71 Miss., 630. As a matter of fact, it appears that Leonard finally paid less than ten per cent. interest on the money actually borrowed; but be this as it may, he is bound by the voluntary settlement made by him, in which settlement it does not appear that there was any mistake of fact. The proof does not sustain the charges of fraud made in the bill of complaint.

The decree of the lower court is reversed, and a decree entered here dismissing the suit at the cost of the appellee.

BRUTUS J. CLAY ET AL. v. LUCY C. FREEMAN ET AL.

1. SUBROGATION. *Principal and surety. Creditor. Indemnity. Security.*

A security given by a principal to his surety, which is not conditioned to secure the debt, but merely to indemnify the surety, cannot be enforced by the creditor.

2. SAME. *Contingent liability.*

Even if the security in such case is conditioned to pay the debt if it provides for its enforcement only upon a certain contingency, it is a mere indemnity, and can be enforced only according to its stipulations.

FROM the chancery court of Bolivar county.

HON. A. H. LONGINO, Chancellor.

The appellants obtained a money decree, in equity, in the circuit court of the United States for the northern district of Mississippi, at Oxford, against appellee, Lucy C. Freeman.

Brief for appellants.

From this decree said appellee prosecuted an appeal to the United States circuit court of appeals at New Orleans, the appellees, Charles Scott and F. M. Scott, becoming sureties upon the appeal bond. At the time of the execution of the bond, the principal therein and one D. J. Field executed and delivered to the sureties a writing obligatory, which was in form a conveyance of certain lands to one Woods, as a trustee, and which, after reciting the decree, appeal, the execution of the appeal bond and an agreement to hold the sureties on the bond harmless, provided, the term "we" meaning the grantors or makers of the writing: "Now, therefore, if said Lucy C. Freeman prosecutes said appeal with effect, and if she shall answer all costs and damages if she fail to make good her appeal, and if we promptly pay any judgment or decree that may be rendered against said Charles Scott and said F. M. Scott, sureties on said bond, and if we promptly pay indemnity to them and hold them harmless as such sureties, then this conveyance shall be void."

The decree was affirmed by the circuit court of appeals, and appellants obtained judgment upon the appeal bond, upon which an execution was issued with return *nulla bona*. This suit was then instituted by appellants to subject the lands conveyed to Woods, trustee, in the writing obligatory executed by Lucy C. Freeman and Field to the sureties, Charles Scott and F. M. Scott, to the payment of the original decree. The court below decreed for defendants, and the complainants appealed.

Nugent & McWillie, for appellants.

Looking to the face of the trust deed, it will be seen that it is not the character of instrument contended for by appellees. After stating that the Scotts had, at request, signed as sureties the bond for \$5,400, and the agreement to hold them harmless, the deed recites the following: "Now, therefore, if said Lucy C. Freeman prosecutes said appeal with effect, and if she shall

Brief for appellee.

answer all costs and damages if she shall fail to make good her appeal, and if we promptly pay any judgment or decree that may be entered against said Charles Scott and said F. M. Scott, sureties on said bond, and if we promptly pay indemnity to them and hold them harmless as such sureties, then this conveyance shall be void." The appellants recovered judgment on the appeal bond against the Scotts, who are insolvent, and the very condition in which liability attaches by the terms of the deed has arisen. The trust deed in the case does not differ materially from that in the *Hemingway* case. *State v. Hemingway*, 69 Miss., 505. The grantors provided the conveyance as a means of paying the judgment recovered on the supersedeas bond, which bond served the purpose intended. It is manifest, in this case, that the trust deed was intended to be availed of by the creditor in case the appellant secured judgment against the Scotts, and this is a full answer to the objections of counsel.

Sillers & Owens and *Brame & Alexander*, for appellee.

The law is well settled, and with perfect unanimity, that a creditor is never subrogated to the security which a stranger has given to indemnify the sureties of the debtor. It is not necessary to cite the cases in detail. The rule is clearly announced in *Brandt on Suretyship*, sec. 326. On this ground alone the chancery court rightly dismissed the bill. It is a settled rule in the matter of suretyship that a security given by a principal to his surety, in order to avail a creditor, must be conditioned to secure the debt. If it is merely to indemnify the surety, it cannot be enforced until the latter has sustained loss. Where the security is not for the payment of the debt, but as a personal indemnity, the creditor cannot be substituted to it and enforce it, at least until the surety has suffered the loss. The surety must have the right to enforce it before the creditor can. A reference to the text-book above cited will show that this court has gone further in recognizing this distinction than the courts of most states. *Poole v. Doster*, 59

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Miss., 258; *Bush v. Stamps*, 26 Miss., 463; *McLean v. Ragsdale*, 31 *Ib.*, 701.

The rule that substitution to a personal indemnity will not be allowed is recognized as the law in *Brandt on Suretyship*, sec. 326. We refer the court, also, to *Hampton v. Phipps*, 108 U. S., 260; *Leggett v. McClelland*, 38 Ohio St., 624; *Taylor v. Bank*, 87 Ky., 398; *Macklin v. Bank*, 83 *Ib.*, 314.

Chas. Scott and *E. H. Woods*, on the same side.

There is no room for applying the doctrine of subrogation, in view of the facts disclosed by the record. "Subrogation is the substitution of another person in the place of the creditor or claimant, to whose rights he succeeds in relation to a debt or claim asserted, which has been paid by him," etc. 24 Am. & Eng. Enc. L., 187. The general rule is, that the right to subrogation does not arise until the default of the principal has been made good.

It seems that there is an exception to this rule if the principal is insolvent, and it is necessary for the court to intervene to protect a surety from a payment that he will be compelled to make; and there is an exception sometimes in case of fraud, in order to protect a surety. *Ib.*, 216, 217; *Magee et al. v. Leggett*, 48 Miss., 145, 146.

The general proposition is, that before the right accrues there must be a discharge of legal obligation for another who is under a primary obligation. *Staples v. Fox*, 45 Miss., 680. In this case it appears from the pleadings that neither *Chas. Scott* nor *F. M. Scott* have paid one cent because of their suretyship on the appeal bond executed by *Mrs. Freeman*, with them as sureties. Not only has nothing been paid, but it is shown that they can pay nothing, and are expected to pay nothing in the future, because of their insolvency. There is nothing in the record to suggest that either *Chas.* or *F. M. Scott* has been damaged in any way as sureties on said appeal bond. Such being the facts, the complainant cannot invoke the doctrine of

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subrogation. "Equitable subrogation cannot displace the real contract of the parties." *Trust Co. v. Peters*, 72 Miss., 1058.

By reference to the deed of trust executed by Lucy C. Freeman and David J. Field to E. H. Woods, trustee for Chas. and F. M. Scott, it will be seen that it provides only an indemnity to the sureties in case they were forced to and did pay out money on account of their suretyship. Neither Chas. Scott nor F. M. Scott having paid anything whatever on account of such suretyship, have no right to ask for indemnity, and what they could not ask under the contract or trust deed, the complainant shall not be permitted to ask. This is obvious from the terms of the instrument just mentioned.

COOPER, C. J., delivered the opinion of the court.

In *Pool v. Doster*, 59 Miss., 258, Judge Campbell, speaking for the court, deduced from our previous decisions, with clearness and precision, the rule by which it is to be determined when a creditor may have the benefit of securities held by the surety of his debtor. We can add nothing to it, and nothing can be taken from it. He said: "The rule deducible from our decisions is, that to make a security available to the creditor, it must be conditioned for the payment of the debt and for enforcement on default in its payment—in other words, it must be expressed to be for the security of the debt, and to be enforceable for its payment, or, otherwise, it will not be held to be enforceable in behalf of the creditor. And even if the security is conditioned for the payment of the debt, but stipulates for its enforcement in a specified contingency, it will be held to be a mere indemnity to the surety, and only enforceable as such according to its terms." In *McLeun v. Ragsdale*, 31 Miss., 701, the security was conditioned for the payment of the debt, but the court held that this was a mere means for affording indemnity to the surety, and that the creditor was not entitled to its benefit.

One of the conditions of the mortgage in the present suit, is

Brief for appellant.

that the debtors should pay any judgment that might be rendered against the sureties, and it also authorizes the sureties to require sale by the trustee in event that this condition is not performed. But it neither authorizes nor requires the trustee to pay the debt, if the property is converted into money, but directs him to place in the hands of the sureties a sum sufficient to indemnify them against loss. It thus appears that the sole purpose of the security was to indemnify the sureties, and, under the rule which obtains in this state, the security is not available to the creditor.

The decree is affirmed.

GEO. W. OWENS ET AL. v. YAZOO & MISSISSIPPI VALLEY
RAILROAD CO.

TAXATION. *Levee taxes. Lands outside of levee not liable. Laws of 1858, p. 32; laws of 1867, p. 237; laws of 1871, p. 57; laws of 1888, p. 40, construed.*

Lands lying between the Mississippi river and the levees built for protection against the waters thereof are not, under any law of this state, subject to taxes imposed for the construction of such levees or to meet liabilities incurred therein.

FROM the chancery court of Tunica county.

HON. A. H. LONGINO, Chancellor.

The opinion states the case.

Calvin Perkins, for the appellant.

All of the legislation in reference to levees, up to and including the act of 1858, exempted from levee taxes the lands lying between the levee and the river. Laws of 1850, pp. 38, 187, 220, 225; laws of 1858, p. 32. The act of 1867 provided a scheme for the liquidation of debts incurred under the act of 1858, and only had in view the subjection of the lands

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liable to levee taxation under existing acts. In other words, lands embraced in the old levee districts, created by the acts of 1858 and 1865, that created by the act of 1865, not including the county of Tunica, where the lands in controversy are situated. Laws of 1867, pp. 237, 248; laws of 1865, pp. 51-66; *Green v. Gibbs*, 54 Miss., 608-9. The intent to exempt lands outside of the levee is clearly shown by the amendment of this act, passed in 1871. Laws of 1871, p. 65. The act of 1871, whereby the levee district No. 1, including Tunica county, was created, is so framed that lands outside of the levee are not within the district. The lands were never in any levee district, were never held by Gwin and Hemingway, commissioners, and could not be conveyed by them to the appellee. And as the act of 1888 only related to lands held under these commissioners the auditor's deed to appellee under that act was also nugatory. Laws of 1888, p. 40.

Mayes & Harris, for the appellee.

The brief of counsel for appellee cannot be found.

CALHOON, Special J., delivered the opinion of the court.

The railroad company filed its bill to remove as a cloud on its title a claim of ownership by Owens of certain lands in Tunica county, and to enjoin the other appellees from cutting on or removing cut timber from the lands, which they were doing under the authority of Owens.

The answer disclaims any assertion or claim of title to any of the lands described in the bill except that part of them described as all of section 33 and the southwest $\frac{1}{4}$ of section 34, township 4, range 12 west, and these are now the only subjects of controversy.

The claim of title by the railroad company is deraigned as to the north $\frac{1}{2}$ of section 33 and the southwest $\frac{1}{4}$ of section 34, through a tax deed from the sheriff to the state, of July, 1868, for general state and county taxes of 1867, and the liquidating

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levee tax deed of May, 1869, to the board of liquidating levee commissioners for the liquidating levee taxes of 1868, and, as to all the lands in controversy, through a sale to the state under the abatement act in May, 1875, and through a deed from Gwin and Hemingway, commissioners, to the railroad company, and also a deed from the auditor to it purporting to convey the state's title under the act of March 2, 1888, to quiet titles. Laws 1888, page 40.

The defense of appellants is, that the title set up by the railroad company is a nullity, because Gwin and Hemingway could, as commissioners, and the auditor could, sell lands only which were in the levee district, and subject to taxation for levee purposes, and that the lands in controversy are west of any levee ever constructed, are between the Mississippi river and the levee, and were never in the levee district, never subject to taxation for levee purposes, and that, while the title to these lands is in the state, Owens bought the title of the original owners in 1888, and has paid all taxes since, and the state only can dispute his title.

The questions which arise are these: (1) Were the lands in a levee district? (2) If not, could Gwin and Hemingway validly sell them as commissioners? (3) If not, could the auditor validly sell them under the act of 1888?

It seems plain that the lands between the levee and the river were never in any levee district and never subject to levee taxes. It does not appear to be disputed in this case that lands west of the levees were excluded from taxation by all the levee legislation prior to 1858. The whole express policy of the state was, before then, to exclude in terms any conclusion that it would commit the monstrous wrong of taxing, to build levees, lands outside of them, which levees could not benefit, but must, in the nature of things, greatly injure if not destroy its value. Counsel seem to regard the first section of the act of December 2, 1858, entitled "An act to aid in repairing and perfecting the levee of the Mississippi river in the counties of," etc., as

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matter of serious debate, because that section describes the lands to be taxed for levee purposes as "each and every acre of land in this state lying east of the Mississippi river," and so on.

This section would raise a very serious question indeed as to whether its general terms were designed to reverse the settled policy and commence to tax lands outside the levees. Fortunately the trouble is relieved by the concluding clause of section 18 of the same act, page 40, laws 1858, which uses this language: "Nor shall lands lying between the river and the levee, excluded from protection by the levee, be liable for levee tax." So, the humane and enlightened policy of exempting lands outside the levees from being taxed to build them or to pay old debts incurred in their construction, so far from being abandoned, was again emphasized by the act of 1858.

It seems hardly the subject of serious question that the act approved February 13, 1867 (Laws, pp. 237-248), to provide for the payment of the old debts of the board of levee commissioners organized under the said act of 1858, does not reverse the old policy of fairness and propriety. The first section alone can be instanced upon which to hang a doubt, and that manifestly shows that the legislative mind had the old levee district in mind.

A uniform current of legislation, consonant with justice and fairness, and exhibiting a settled state policy, and containing clauses of express exemption, will never be regarded as repealed by general language in a statute unless irreconcilable by a liberal construction in arriving at the legislative intent. The first section of this act, so far as necessary to quote, reads thus: "That there be, and is hereby, levied and assessed a uniform tax of five cents an acre per annum on each and every acre of land in the counties of Tunica, Coahoma, Bolivar, Washington, and Issaquena, and in such part of DeSoto county as was included in the levee district formed by the act approved December 2, 1858, and a like tax of three cents per acre is

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hereby levied and assessed, per annum, on each and every acre of land lying in any other county included in said levee district, and which was subject to taxation by virtue of the provisions of the act of December 2, 1858."

Manifestly, the levee district under the old law was here in mind. If there had been any purpose to repeal the previous express exemptions of lands outside the levee, the purpose would have been clearly stated. But, so far from this is it, that there is no such repealing clause, and the only repealing clause is in the eighteenth section, and in these words: "And that all other acts prescribing other modes of payment of the indebtedness herein provided for, be repealed."

Repeals by implication are not favored by the law of construction of statutes, and are allowed only where there is clear repugnancy. The latter must sometimes yield, where general terms are used, and the real intent gathered from the whole scope of the act and history of legislation. Especially must this be so when the antecedent legislation is beneficent, and commends itself to plain principles of justice.

It had been the settled policy of legislation in Mississippi to allow minors a year after reaching majority to redeem lands sold for taxes. A revenue act of 1846 omitted this. Our high court of errors and appeals, Judge Handy delivering the opinion, upheld the right to redeem (*Richards v. Patterson*, 30 Miss., 583), and on the ground that there was no plain repugnancy or clear intent to repeal the former parts of statutes giving the right. It follows from the foregoing views that the lands in controversy were never in any district subject to taxation for levee purposes.

We think it plain that no title whatever was conveyed by the deed of Gwin and Hemingway, commissioners. This deed on its face shows the conveyance to be of "the following lands, the same being the property of the late liquidating levee board, and sold as such, the parties of the first part conveying only such title as the late liquidating levee board has." But the

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late liquidating levee board had no title whatever, because under no law ever in force could this board acquire title to any land not within the levee district. All intendments are against the state's parting with her title unless the purpose plainly appears.

The act of March 2, 1888, referred only to lands in the levee district by any fair construction. It referred to the lands, embraced in that district, sold by Gibbs and Hemingway and Gwin and Hemingway as commissioners. We think it unnecessary to dissect this act, because our conclusion will be apparent upon an examination of it. If, by any misadventure or clerical misprision, there had crept into the decree or commissioner's deed lands on the Chickasahay, it could hardly be seriously contended that the state designed to part with her title to those under that act.

The history of levee lands shows a witch's cauldron mixture of titles, by sales to one or the other of divers levee boards, and the state itself, for general taxes. This mixture produced an incertitude which clogged sales, prevented purchasers from buying from individuals or the state, and produced a state of affairs such as that learned lawyers could not form a satisfactory opinion as to the validity of titles. So, in the language of the preamble of the act, "The development and settlement of that portion of the state [the levee district portion of the state] is [was] much retarded by the unsettled condition of land titles," and, therefore, the state proceeded to yield up her own claim of title to any purchasers from those commissioners of lands in the levee district where the titles were unsettled, upon certain terms.

The decree is reversed, and decree is ordered here dismissing the bill.

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ALABAMA & VICKSBURG RAILWAY CO. v. ANNA M. ODENEAL.

74	827
193	684

ACTION. *Premature institution. Statutory penalty. Railroads. Farm-crossing. Code 1892, § 3561.*

An action for a second enforcement of a statutory penalty, on the ground of a continuance of the wrong, is premature when brought on the day of the disallowance, by the supreme court, of a suggestion of error to its judgment in a prior suit establishing plaintiff's right to the penalty, no reasonable time to repair the wrong being afforded the defendant.

FROM the circuit court of the first district of Hinds county.

HON. ROBERT POWELL, Judge.

The opinion states the case.

Nugent & Mc Willie, for the appellant.

Brame & Alexander, for the appellee.

WHITFIELD, J., delivered the opinion of the court.

Not until the suggestion of error in the former case was overruled, November 4, 1895, was there a final ascertainment of the right of appellee to the farm-crossing. The agreed record stipulates that, "within a reasonable time after the suggestion of error made to this court was disallowed, the defendant met the demands of the plaintiff in respect to the crossing complained of, and constructed it according to the plaintiff's wishes;" and that the present suit was instituted on November 4, 1895—the very day the suggestion of error was disallowed. On these facts it is clear that the judgment of the court below is erroneous. The law does not require unreasonable or impossible things.

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In *McDowell v. Railroad Co.*, 37 Barb., p. 198, it is said, in construing a statute requiring a railroad company to construct and maintain fences, and where the fence had been left down for some two months: "If they [the fences] are suffered to go to decay and delapidation, or by any unavoidable accident they are broken down, . . . and are not repaired within a reasonable time, . . . and are allowed to remain open for weeks and months, it cannot be said that they are maintained." In other words, a reasonable time was allowed for repairing a broken fence, under a statute requiring it to be constantly maintained. In *Spinner v. Railroad Co.*, 67 N. Y., p. 156, this rule was approved, and applied to the case of a gate left open, being part of the fence, the court saying: "It has been held in the supreme court that, if a fence is thrown down, or blown down, or pulled down by a trespasser, the railroad company, not having notice thereof, is not liable because it does not at once put it up again, and that it has a reasonable time in which to repair it. And this seems to be a rational rule, and may be applied also to the case of a farm-crossing gate left open." That is, the company would have a reasonable time after notice that the gate was down. The first authoritative information which the appellant received that the appellee was entitled to the farm-crossing here, was given it when the suggestion of error was overruled, November 4, 1895, and the "rational rule" announced in the cases quoted, and which we approve, gave appellant a reasonable time, after this notice was received, within which to construct the crossing, and, having complied, within a reasonable time, with this duty, the appellee was without cause for complaint.

Judgment reversed, and judgment here dismissing the suit.

Brief for appellee.

BENJAMIN F. HYMAN v. THE STATE OF MISSISSIPPI.

UNLAWFUL SALE OF INTOXICATING LIQUORS. *Distinct sales. Instruction.*

It is error, upon the trial of a defendant for the unlawful sale of intoxicating liquor, to admit evidence of more than one sale, and, if such evidence is admitted without objection, it is error to give an instruction for the state which ignores the rule in such cases that the conviction must be predicated of one sale.

FROM the circuit court of Claiborne county.

HON. W. K. McLAURIN, Judge.

The facts are sufficiently stated in the opinion.

J. C. McMartin, for appellant.

Appellant was represented in the lower court by another. His counsel here had no connection with his case until after his motion for a new trial had been overruled.

The court below erred in allowing the introduction of evidence of more than one sale. *Ware v. State*, 71 Miss., 205; *Newman v. State*, 72 Miss., 126. The court permitted the state to prove numerous sales from 1892 to 1896, and up to the finding of the indictment. The court clearly erred in granting the instruction given to the state. It includes a period of four years, though the prosecution was barred after two years.

Wiley N. Nash, attorney-general, for the appellee.

It will be remembered that in the case of *Ware v. State*, 71 Miss., 205, evidence of other than one sale was promptly objected to, and the evidence was introduced, in the language of the court, "over their objection." In the case at bar there was no objection. Also in the case of *Naul v. McComb City*, 70 Miss., 700, when a second sale was sought to be proved, the

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testimony was objected to. In the case at bar there was no objection.

It must affirmatively appear that the exception was taken in the mode prescribed by law; that is to say, if the objection is to the introduction of testimony, the objection must have been made at the time the evidence was introduced, and not after the termination of the trial. It would be a farce to allow a practice to grow up of allowing all the testimony to come in without objection, and after a verdict of guilty had been rendered, then to permit the prisoner, for the first time, to raise objection to the introduction of testimony.

WHITFIELD, J., delivered the opinion of the court.

The defendant's testimony was not an admission of a sale. On the contrary, he contradicted Price, and stated that his account of the affair, and not Price's, was the correct one. We cannot notice the assignment as to the improper admission of evidence, because throughout the entire trial no objection was made to the admission of the testimony. But the instruction given for the state is properly before us, and it is only necessary once more to make reference to the emphatic utterances of this court in *Naul v. McComb City*, 70 Miss., 701 (by Cooper, J.); *King v. State*, 66 Miss., 502 (by Arnold, J.); *Bailey v. State*, 67 Miss., 334 (by Campbell, J.); and *Ware v. State*, 71 Miss., 205 (by Woods, J.), to show that the charge was manifestly wrong, and, on the range the proof took, reversible error. This court has iterated and reiterated the rule that, in cases of this character, the evidence must be confined to one sale. Yet, in this case, evidence was offered to show numberless sales, scattered through a period of four years, and the court actually charged the jury that if they believed, from the evidence, that the defendant "did sell and retail vinous and spirituous liquors between the year 1892 and the year 1896 in the county of Claiborne, then he was guilty, and they should so find."

Syllabus.

We regret the necessity of reversing this case, but this conviction cannot be affirmed without violating the established principles of law applicable to this sort of case, which the defendant was entitled to invoke.

Reversed and remanded.

ALONZO J. WEEMS ET AL. v. LOVE MANUFACTURING
COMPANY ET AL.

1. JUDICIAL SALES. *Caveat emptor. Warranty. Exception.*

The general rule is that judicial sales are made without warranty, and the doctrine of *caveat emptor* is applicable; but this rule should not be enforced so as to compel a purchaser to pay his entire bid after he had been made to satisfy a prior demand against the property, where the whole litigation and sale had proceeded upon the idea that the property was sold freed from incumbrances, and that the proceeds were to be devoted to their satisfaction.

2. ASSIGNMENT FOR CREDITORS. *Receiver. Sale. Code 1892, ch. 8.*

In the case of a general assignment, administered under code 1892, ch. 8, where previous attachments have been levied upon the property, a sale made by the assignee-receiver should be of the property freed from the lien of the attachments, and the proceeds should be applied by the court to the payment of the attaching creditors if they prove prior right, they being parties to the chancery suit.

3. SAME. *Assignee-receiver. Dual relation.*

Under code 1892, chapter 8, the assignee in a general assignment, who has given bond, etc., occupies a dual relation. *Perry-Mason Shoe Co. v. Sykes*, 72 Miss., 390, approved.

4. SAME. *Fraud. Penalty.*

The only penalty inflicted by the law upon one who executes, or procures the execution to him, of a fraudulent assignment, is the loss of the benefits of the instrument.

FROM the chancery court of Lauderdale county.

HON. N. C. HILL, Chancellor.

Brief for appellant.

The appeal in this case, which was denied by the chancery court, but was granted by the judges of the supreme court, was prosecuted by Weems and others, from the decree of the chancery court ordering them to pay into court the sum bid for property sold by the receiver. The opinion states the facts.

J. A. P. Campbell, for appellant.

The assignee filed his petition as the statute requires, making the assignor and all creditors parties, and the effect was to draw to the chancery court the administration of the assets, and when the court ordered the property sold, it did so for the purpose of substituting the proceeds of the sale for the property.

There is no denial of the power of a chancery court to enforce its decrees, and prevent trifling with its proceedings—in proper cases to punish for contempt, but not to use this power oppressively, or as a means of imprisoning for debt, in violation of the constitution, and on proper grounds to order a resale of property; but in this case, with its peculiar features (probably never exhibited before, and not likely to be seen again), it is a vain and useless thing, and a great injustice to Weems, the surety of the court's officer, who has already paid out much more than the sum of his bid in discharge of a judgment against the receiver who sought to save the property from attachment, to require him to pay the money into court. The creditors would have claimed the fruits, had the receiver succeeded in the litigation, and should not be allowed to assert any higher claim than he can against Weems, his surety, who has already largely overpaid his bid.

But for the claim of the receiver, and bond by Weems as his surety, the property would not have been subjected to the control of the chancery court. The petition of the assignee was premature as to nearly all of the property, for the petition is to be filed after taking possession (code 1892, § 117), and he did not have possession, except of a little. Yet he filed his

Brief for appellant.

petition and proceeded in his character of receiver to claim the property, give bond, and get possession, and in this condition creditors mixed in the fray. They became parties to the proceedings and should be bound by them. They succeeded in their attack on the assignment, and if there was anything beyond the sum necessary to satisfy claims on the property paramount to theirs, they would be entitled to it. But there is no surplus after satisfying the mechanic's lien for \$445, and the Blalack lien acquired before the assignment was made. These are superior claims, have been paid by Weems, and are held by him. Shall he, under the history of this peculiar case, be denied his rights as a creditor, and be compelled to raise a great sum of money to pay into court, when it is manifest that he will immediately be entitled to it?

Suppose the order made to pay in the money for the court to gaze at, or to preserve the regularity of proceedings, or to maintain the court's authority, and that Weems failed to pay, and was attacked for contempt. He would be allowed to purge himself of any contempt, and to show what he has shown, and that he has been reduced to insolvency largely by what he has had to pay as surety for the receiver (really by the court, which by his suretyship got control of the property) in this very litigation, into which these creditors pitched, to get what they might out of the property thus dealt with. Would not Weems stand purged of contempt? Then, why not anticipate the result and recognize the man's rights, as they now plainly appear? Shall his rights be sacrificed or subordinated to some notion of regularity of proceedings? Shall he who stands in the favored position of a surety of the court, through its officers be subjected to the hardship and inconvenience proposed under the peculiar circumstances of this unprecedented case? Shall not justice be done now when the whole matter is before the court? Shall right and justice be subordinated to mere form? Weems made his defense, and the facts are all before the court. If there is any claim superior to his to be satisfied out of the pro-

Brief for appellant.

ceeds of his bid let him be required to pay that, but to the extent that he will be entitled to claim the money, if actually paid in, let him be treated as having paid it. Then the end will be reached and justice done. The chancellor would not set aside the sale, for he found no ground for that. He recognized that the sale was proper and had been confirmed, and he reconfirmed it, but ordered the receiver to take possession until money was forthcoming. Nothing but money would do. A resale could be justified only as a means of raising the money, but not under the peculiar circumstances of this case, where the money far exceeding the bid at the sale has been actually paid by the purchaser, for Weems was, by the relinquishment of Brown, made and treated by all concerned as the purchaser. The attention of the court is invited particularly to *Clarkson v. Read*, 15 Grattan, 288; *Deavor v. Reynolds*, 1 Bland's Ch., 50; *Camden v. Mayhew*, 129 U. S., 73, as illustrative of the view taken by the courts of such matters as are here involved.

G. Q. Hall, on the same side.

When the chancellor, in the face of the facts pleaded, established and undisputed, ordered Weems to pay the money into court, it was thereby adjudicated of necessity that Weems' defense was not good. It was of necessity forever an adjudication of that fact. Why? Suppose Weems had not appealed and had declined to pay. Could he purge himself from contempt by averring and proving what he has already averred and proved? No. The court would respond: "I have already ordered the money paid into court. I did that in the face of your answer and your proofs. Therefore, of necessity, the order settled, so far as this court is concerned, that your alleged payments would not be treated nor recognized as payments, but only as a claim that you might propound after you had paid the money into court." It would be a waste of words for Weems to insist that, the money being already exhausted, he had none of the court's money, and that he should not now be required,

Brief for appellant.

in his present insolvent condition, to raise so large a sum and pay into court upon a mere technicality, and be burdened with the fees and expenses of procuring its repayment to him. The very technical contention, as the argument of counsel below and the chancellor's order implies, is that Weems' rights rest upon the principle of subrogation and substitution—that he should pay the money into court and then propound his claim to it by virtue of his having paid off paramount claims against the estate; that he should then aver and prove what he has already averred and proved. This, we respectfully submit, is the veriest sticking in the bark—the clinging to the shadow when the substance is gone.

Nor is the case at bar analogous in principle to those which hold that there can be no evasion or circumvention, and that the price bid must be paid in money, as instanced in *Blythe v. Hernandez Bank*, 17 So. Rep., 4; *Parham v. Stith*, 56 Miss., 465; *Baughn v. Shackelford*, 48 Miss., 264; *Water Valley Mfg. Co. v. Seamon*, 53 Miss., 655; *Baines v. McGee*, 1 Smed. & M., 208; *Elliot v. Connell*, 5 Smed. & M., 91. The principles settled by those cases is, that where payment is to be made something else cannot be substituted for payment—as, by taking credit on individual account instead of cash, or accepting drafts instead of money, or by treating the bid as paid and taking the note of the purchaser as for money loaned—all such cases being recognized as breaches of trust, and mere evasions of the law. The case of *Camden v. Mayhew*, 129 U. S., 73, appears at first blush to bear some analogy to the case at bar, but on further scrutiny the analogy disappears.

In the case at bar, Weems actually paid the cash, and the issue presented is, whether or not the actual money paid by him to the full amount of his bid upon paramount liens under legal process—duress of the law—shall be treated as tantamount to a payment of the money into court. There is no sort of pretense that this money was paid for any improper purpose. On the contrary, it is recognized to have been a *bona fide* payment

Brief for appellees.

in invitum, by legal compulsion. There was no trifling with the court, no effort at evasion or circumvention.

Act of God, superior force, and legal duress, are three things that are recognized by the courts as furnishing a complete answer for nonperformance of any legal duty.

J. S. Ham, for appellees.

Weems had no right to be subrogated to the rights of Blalack, even if he paid the judgment to him. He only paid his own debt or discharged his own obligation. Only a surety who has paid and satisfied the debt of his principal has a right of subrogation. Code 1892, § 3279; 24 Am. & Eng. Enc. L., 190, 191, 192, note 1 to p. 193; *Bank of England v. Tarleton*, 23 Miss., 173; *Bowen v. Hoskins*, 45 Miss., 186, 187. But even if it was conceded that Weems was a surety, still he had no right to be subrogated to the rights of Blalack, unless he had paid off and satisfied the judgment in favor of Blalack. Authorities *supra*, and *Lee v. Griffin*, 31 Miss., 632; *Magee v. Leggett*, 48 Miss., 139. Until the whole debt has been paid and satisfied by a surety, he has no right of subrogation; the creditor is entitled to all his liens and no right of subrogation exists.

Weems and Brown, being purchasers of the property at a receiver's sale, were bound to know that the receiver could sell only such title to or interest in the property as the Queen City Manufacturing Company had at the date of the assignment to Hodges, on the ninth of April, 1894. In other words, the doctrine *caveat emptor* applied to them. And they were bound to ascertain for themselves what that interest was, because the rule applies not only to the title, but to the condition of the property. High on Receivers, sec. 169*b*; Beach on Receivers, sec. 734; 20 Am. & Eng. Enc. L. 150, 151; 9 Wheat., 616; 6 Curtis, 213; *Barnes v. Hamilton*, 70 Am. Dec., 584, 585, note at top of page; 10 Am. St. Rep., 40, and note to p. 45; 2 Freeman on Executions, 313*a*; *Mellen v. Boorman*, 13 Smed. & M., 100; *Sackett v. Twining*, 51 Am. Dec., 599; *Bank v.*

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Martin, 61 *Ib.*, 350. Weems and Brown, being purchasers at a receiver's sale, were bound to pay the amount of their bid, unless they could show that they were induced to buy the property by fraud or misrepresentation as to the true condition of the title, and that they could not, by the use of reasonable diligence, have discovered such fraud or misrepresentation before the confirmation of the sale. *Williams v. Glenn*, 12 Am. St. Rep., 461; High on Receivers, sec. 199a; Beach on Receivers, sec. 732; 13 Smed. & M., 100. A sale by a receiver does not affect existing liens. The property is passed to the purchaser subject to all legal incumbrances, and he may test the validity of all such liens, and the amount thereof. 20 Am. & Eng. Enc. L., 151; High on Receivers, sec. 199a; Beach on Receivers, sec. 732. It is not pretended by Weems and Brown, or by either of them, that they were misled or deceived by Hodges about the property, or the condition of the property, or the title to it, or about the validity of the assignment, or of the attachment which had been levied on the property. The sale was reported to the court and was confirmed, all parties interested being present or having notice and opportunity to be heard. And the decree of the chancellor cannot be collaterally attacked, except for fraud or other matters rendering it void on its face. *Bland v. Muncaster*, 24 Miss., 62, 152; High on Receivers, secs. 191, 192; *Ames v. Williams*, 72 Miss., 760; *Gillespie v. Hauenstein*, *Ib.*, 838.

Miller & Baskin, on the same side.

We submit that this money was a trust fund, and that the order was eminently correct as made by the chancellor—that is, that said money should have been paid into the court. *Coulter v. Herrod*, 27 Miss., 685.

The title of the receiver was subject to all valid and subsisting liens at the time of his appointment. He got only such title as the defendant corporation had in the estate of which he took possession. 20 Am. & Eng. Enc. L., 130, note 1.

Brief for appellees.

Only such title or interest passed to Weems, by virtue of the sale by the receiver, as was possessed by the party whose interest was being sold, and a greater title could not pass, as the rule of *caveat emptor* applies, and it was for the purchaser to ascertain what the interest was that he was buying. 20 Am. & Eng. Enc. L., 150. And the sale by this receiver did not affect the prior liens of these appellees. The property passed to Weems and Brown as purchasers, subject to all legal incumbrances in favor of these appellees and other creditors, subject only to the purchaser's right to show that said liens or accounts due thereon were not correct, or were not proper charges against said property. 20 Am. & Eng. Enc. L., 151. This rule applies to the condition of the property as well as to its title, and in an action for the purchase money it is no defense, in the absence of fraud or misrepresentation, that the property was in a defective condition. 20 Am. & Eng. Enc. L., 150, 151, and note; *Hutchins v. Brooks*, 31 Miss., 430; *Cogan v. Frisby*, 36 Miss., 184; Beach on Receivers, sec. 734.

This sale by the receiver under the order of the court, having made no mention of prior liens or incumbrances, operated as a transfer of title to the said Weems and Brown, subject to the liens and incumbrances that were outstanding, with no right in the purchasers (as laid down in High on Receivers and Beach on Receivers) to contest the title of the third person or a party to the cause in which the receiver is appointed. High on Receivers, sec. 199d; Beach on Receivers, secs. 732 and 734.

A purchaser at a judicial sale cannot successfully resist the payment of the purchase money on the ground that he got no title, unless he can show that he was misled by the seller, and that he used all reasonable diligence, and that he could not by the use of such diligence have discovered the condition of the title. *Williams v. Glen*, 12 Am. St. Rep., 461. So we submit in this case that Weems and Brown purchased the property at said sale in view of the rule of *caveat emptor*, and only obtained the interest that the receiver had in said property, and,

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hence, they got all they bought, and there is no excuse for their nonpayment of their bid at the sale. But, in addition to this, these purchasers had actual knowledge of the condition of the property; they knew, because they were parties to this proceeding from its beginning, all the facts connected with the same—in truth, they were active participators in all the litigation growing out of this matter.

Per curiam : On the eighth day of April, 1894, one Blalack sued out an attachment against the Queen City Manufacturing Company, and caused the same to be levied upon nearly all the real and personal property of that corporation. On the same day several other creditors also sued out attachments at law, and levied on the same property. On the ninth of April the company made a general assignment of all its property, with preferences of certain of its creditors, to Geo. N. Hodges as assignee. On that day the assignee filed a petition and bond in the chancery court of Lauderdale county, and thereby became receiver of said court by the operation of ch. 8 of the code of 1892. To this petition the assignor and all its creditors were made parties defendant, as provided by law. On the tenth day of April Hodges, as assignee and receiver, made claim to the personalty attached at the suit of Blalack, which had been valued by the officer at the sum of \$8,332.50, as his property as such assignee and receiver, and gave bond in the penalty of \$15,000 for the forthcoming thereof, with William T. Brown and A. J. Weems as sureties. He made like claim and gave bonds for the forthcoming of the property attached by the other creditors, with Brown and Weems as his sureties, and, upon the execution of these bonds, the personal property seized was delivered to him. In January, 1894, the Meridian Machine Company, claiming a mechanic's lien for work and labor and materials furnished, had filed its petition in the circuit court of Lauderdale county to have its lien enforced against certain parts of the property which was afterwards included in the assignment

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made by the Queen City Manufacturing Company. In this suit a judgment was rendered in favor of the petitioner for \$422.40 on July 9, 1894.

On the twentieth of July, 1894, the Love Manufacturing Company, and certain other creditors of the Queen City Manufacturing Company, exhibited their cross petition in the chancery court of Lauderdale county, against the Queen City Manufacturing Company, Hodges, the assignee and receiver, and the creditors preferred by the assignment, seeking to vacate the assignment as fraudulent in law and in fact.

While the above named suits were pending and undetermined, several other proceedings were instituted against the receiver by other creditors, or by persons claiming to have a right superior to the assignee, as to parts of the assigned property.

In November, 1894, the Fay & Eagan Company filed a petition, averring that by the assignment there had been conveyed certain machinery of which it had made a conditional sale to the assignors, but had reserved title to the property, and that the purchase money had not been paid, and the petitioners asked the chancellor to make an order directing the receiver to return to them this property, which order the chancellor made.

One W. T. Adams also filed his petition for the restoration to him of a certain engine to which he claimed title; this order the chancellor declined to make, but gave leave to the petitioner to sue its receiver at law to recover said engine.

On August 6, 1894, the receiver filed his petition, asking the court to make an order for the sale of all the property conveyed by the assignment remaining in his hands. In his petition he stated that the Meridian Machine Company had recovered its judgment as above set forth; that Blalack and others had sued out attachments at law, aggregating about \$9,000, before the assignment had been executed; that the Love Manufacturing Company, and other creditors, were proceeding in chancery to vacate the assignment, and that the probabilities were that this

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litigation could not be ended for a year or more; that because of the location of the property it was impossible for him to procure insurance thereon, and that the interest of all creditors would be subverted by its sale.

On August 29 the chancellor made an order reciting that, upon full hearing, the court was satisfied that it would be to the interest of all the creditors of the estate that a sale of the property should be made, and directed the receiver to advertise for bids for the same, to be submitted to the court. On this order the receiver made the following advertisement, which he published in the *Meridian News*, *The Manufacturers' Record*, of Baltimore, and *The Tradesman*, of Chattanooga, viz.:

“For sale—a splendid southern industry at Meridian, Miss., a town of 15,000 inhabitants, with five railroads, that has had steady growth without a “boom,” and has never been disturbed by strikes or financial panics, and surrounded by an inexhaustible supply of hard wood, as well as yellow pine. Queen City Manufacturing Company’s plant, which manufactures spokes, hubs, rims, wheels, etc., all completely new. As receiver, I am directed by the chancery court to advertise this splendid property for bids, to be submitted first Monday in November next, reserving the right to reject all. Correspondence solicited. Can satisfactorily explain why property is in the hands of receiver. Address

GEO. M. HODGES, *Receiver*,

“*Meridian, Miss.*”

On November 4 the receiver reported to the court that he had received no bids for the property, and asked an order of sale for cash at public outcry. This order the court made. In advertising the property under this order, the receiver stated that he would make “good title to the property,” and this advertisement the receiver filed as an exhibit to his report of sale.

On December 1 the public sale was made, when William T. Brown and A. J. Weems became purchasers, at the price of \$7,412.50. When the report of sale was made objections were

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interposed to its confirmation by certain creditors, and, among other grounds of objections, it was urged that the property had been sold at a grossly inadequate price.

We infer that the chancellor would have rejected the report if an offer had been made to advance the bid twenty per cent., for the order of confirmation recites that the objectors refused to guarantee such an advance on a resale, and the sale was confirmed. The sale occurred on December 1, 1894. On December 1 the Meridian Machine Company filed its application, setting up its priority of lien on the property, and asking an order that the receiver might be directed to pay its claim out of the proceeds of the sale which had been ordered, and which the receiver was about to make, and the chancellor made the order as requested. It now appears, from the proceedings subsequently taken in the cause, and which will be hereinafter set forth, that Weems and Brown did not, in fact, pay in cash the amount of their bid to the receiver. Weems gave the receiver his check for the amount of the bid, but asked him not to present it at that time, and the receiver subsequently learned that the check would not be paid by the bank on which it had been given, as Weems had not that amount of money to his credit.

Weems and Brown were creditors of the Queen City Manufacturing Company, preferred in the assignment, and if the attachments of Blalack and others, and the proceedings by the Love Manufacturing Company, seeking to vacate the assignment, could have been defeated, the settlement of his bid would doubtless have been arranged between Weems and the receiver.

So it is that the matters were permitted to stand in this condition for some months, during which time Weems paid to the receiver something over \$1,000 in money, and either paid off or bought the judgment of the Meridian Machine Company. The attachments at law of Blalack and the other creditors were sustained, and the claimants' issue found against the receiver. The result of this was that judgments were rendered against

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the receiver and Weems and Brown, his sureties, for an amount exceeding the sum bid by Weems and Brown at the receiver's sale of the property. A *venditioni exponas* was issued for the sale of the property which had been attached, to prevent which Weems paid in cash the sum of \$5,000 to the judgment creditor, and procured a third person to take an assignment of the Blalack judgment and hold up execution thereof. He claims that, as matter of fact, he paid off the judgment, and being entitled, under the statute, as surety for the receiver to the judgment as assignee by operation of law, he in fact paid off the judgment entirely and assigned it to the third persons as security for the money he advanced. The petition in chancery by the Love Manufacturing Company and others resulted in a decree annulling the assignment, and subjecting the property to the payment of the petitioner's debts. In this condition of affairs, the proceedings giving rise to the controversy now before the court were instituted.

A petition was filed by the receiver setting up the facts that Weems and Brown had not paid the amount of their bid for the property sold at the receiver's sale, and praying the court to make an order upon Weems and Brown either to pay to the receiver the unpaid purchase money, or to restore the possession of the property to him in order that a resale thereof might be made. Brown having in the meantime conveyed to Weems his interest in the property bought at the receiver's sale, the latter answered the petition of the receiver setting up the payments he had been compelled to make as surety for the receiver under the attachment of Blalack and others, and insisting that this was in effect a payment of the sum due the receiver. On the hearing the chancellor directed Weems to pay into court the amount of the bid and reserved all questions as to the distribution of the fund for further consideration. From this decree Weems prayed and obtained an appeal with supersedeas, and the question presented is whether, under the circumstances, this order should have been made.

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The principal point made and relied on by the receiver is, that the chancery court sold, and Weems and Brown bought the property, subject to all prior liens and incumbrances existing upon it; that the rule of *caveat emptor* applies to judicial sales, and that the officer of the court makes no warranty whatever as to the title, and the purchaser takes only the title of the litigants, and holds it, as they did, subject to all liens upon it. The correctness of this proposition as a general rule is undoubted, but we think it can have no application under the facts of this case. Manifestly, neither the court nor the receiver nor the purchasers understood that the sale in this case was subject to this rule.

The advertisement which the receiver made for bids to be submitted to the court, shows upon its face that the property was offered to the public as property unincumbered by any liens of which the court had notice. It was advertised as property in a condition to be put in the shape of a going manufacturing concern. Failing to obtain bids under this advertisement, the property was advertised for sale, and the assurance given in the notice that good title thereto would be made.

After the order of sale had been made and while the property was advertised and but four days before the day of sale, one of the creditors having confessedly a superior lien, applied to the chancellor and secured an anticipatory order for the payment of his claim out of the fund to be realized by the sale.

In June, 1895, another creditor standing, so far as the record shows, in the precise attitude of Blalack, was pressing his execution, and the receiver applied to the court and secured an order for the payment of this judgment out of the proceeds of the sale.

The whole record demonstrates that all the parties and the court intended and understood that a sale of the property was to be made, discharged of the liens claimed by the adversary litigants, and that the proceeds of sale were to stand in lieu of the property, and to be distributed according to the rights of

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the parties as they would have been had no sale occurred. Indeed, no sale should have been made except upon such understanding. The receiver, as the representative of the court, was bound upon the forthcoming bond, by virtue of which alone the chancery court secured jurisdiction of the property.

The protection of its officer devolved upon the court the duty of preserving the property or its proceeds for the satisfaction of any judgment that might be rendered against him. It would be an improper thing for a court to order a sale and consequent dissipation of personal property, for which its officer was bound to answer, and apply the proceeds arising therefrom to the payment of other demands. If this were done, and the property removed by the purchaser beyond the jurisdiction of the court, and the proceeds distributed among other creditors, the court would be in danger of finding itself unable to protect its officer and his sureties, and unable to comply with its duty of restoring the *status quo*, and the result would be, either that the officer of the court and his sureties would be called upon to respond as individuals, or the rights of the prior attaching creditors would be disregarded.

It is no answer to this to say that Weems solicited the receiver to make the bond; that he was interested in the litigation; that he was an officer of the insolvent corporation, and participated as such in the making of the fraudulent assignment in which his own claim was preferred. He is in this case as a surety for the receiver, and, as such, indirectly a surety for the court. He has suffered the only penalty that the law inflicts for the execution of the unlawful assignment, viz., a loss of all the benefits it secured to him.

Because he may not retain the benefit given to him by the fraudulent assignment, does not carry with it the further and other penalty of personal responsibility to other creditors; his liability cannot be greater than their rights, and they have none, under the developed facts of this case, except to subject the property of their debtor to the payment of their demands. We

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are, therefore, clearly of the opinion that the only proper course for the court to have pursued under the circumstances of this case, was to order an outright sale of the property discharged of the conflicting liens, and to hold the fund for distribution among creditors according to their priority of right; that this was what was done, and intended to be done, by the court, and that the rights of all parties should be settled accordingly.

While the course of procedure has been irregular, we are unable to perceive any reason why Weems should now be required to pay into court the fund which he has already once paid to the party entitled thereto. Under our statute governing cases of general assignments, the assignee who has given bond as required thereby, occupies a dual relation as receiver and assignee. If the assignment is sustained, he is receiver of the court, but if it is successfully assailed and overturned, his character as assignee largely predominates, and limits his rights as receiver in very many particulars.

The subject is fully discussed in the case of the *Perry-Mason Shoe Co. v. Sykes*, 72 Miss., 390, and we can add nothing to the very clear opinion of our Brother Whitfield in that case. An application of the principle therein announced to the facts of this case will show that there are no rights in the receiver which require this fund to pass through his hands. The sum already paid to him in cash is probably more than sufficient to discharge any claim against the property existing in favor of the receiver. If, however, upon a full investigation, it shall be made to appear that any other creditor, or the receiver himself, has a right superior to that of the parties to whom Weems has made payments, to any part of the fund, he should be required to pay such sum into court, but such sum only. About \$440 worth of the property sold seems not to have been attached by anyone prior to the filing of the cross petition by the Love Manufacturing Company and others. Unless the value of this property has been disbursed, or may be necessary to be disbursed in the payment of claims or expenses having

Brief for appellants.

priority over the cross petitioners, they would be entitled to the payment thereof, as their lien on this property seems to be prior to that of any other creditors. This matter may be fully investigated and determined in the further prosecution of the cause. An account should be fully stated, under the direction of the court, touching all the conflicting claims, and a proper decree made for their settlement, giving in such accounting credit to Weems for any sum he has paid out in the discharge of liens upon the property in their order of priority. For any sum which, upon such accounting, shall appear to be needed for the payment of claims superior to those he has discharged an order should be made directing its payment into court by him.

The decree will be reversed and the cause remanded to be proceeded with in accordance with this opinion.

ROBINSON MERCANTILE Co. v. W. B. THOMPSON & Co.1. PRINCIPAL AND AGENT. *Special agent. Authority.*

A special commission to buy cotton at a designated place from certain persons is not an agency to buy at a different place from others.

2. SAME. *Purchase. Equal quality and value.*

In such case it makes no difference that the cotton elsewhere purchased was of equal value and quality.

FROM the chancery court of Hinds county, second district.

HON. H. C. CONN, Chancellor.

The opinion states the facts.

Brame & Alexander, for appellants.

The limitation attempted to be imposed upon the authority of Reed, in this case, was unreasonable, and not in accordance with the law governing such cases. The defense relied upon

Brief for appellants.

is not a meritorious one, and it was seized upon as an afterthought, merely to avoid the consequences growing out of a fall in the price of cotton. It was a pure afterthought to assert that the cotton sold was not of the quality contemplated, but was of inferior quality, raised on poor land, etc. If the price of cotton had gone up, Mr. Reed would have been complimented by the defendants for his prompt and intelligent execution of orders and his success in securing a better lot of cotton than was ordered, with better freight rates, etc.

We presume little need be said in regard to the statute of frauds. "The statute only requires signing by the party to be bound; the other party confirms the contract by offering to perform or by bringing suit." *Marquese v. Caldwell*, 48 Miss., 23; *Peevy v. Haughton*, 72 *Ib.*, 918. But a broker is agent of both parties, where his character as such is known. 8 Am. & Eng. Enc. L., 720, note 10. Here it is undisputed that Reed was known to both parties as a broker or buyer. "Brokers or factors may sell in their own name, and the principal is bound as if his name were used." 3 Am. & Eng. Enc. L., 320, note 1; 63 Miss., 342.

The telegrams in this case, when construed together, constitute a complete contract in every respect.

Whether an agent is general or special, the principal is bound by acts of the agent within the authority given, and this includes also whatever usually belongs to their performance. 1 Am. & Eng. Enc. L. (new ed.), 988, and notes; *Ib.*, 995, note 8; 94 Mich., 349.

But even if Reed is to be considered a special agent, and even if we have not properly construed the authority given him by the telegrams under the facts above stated, we call the attention of the court to the fact that, at the most, his instructions were ambiguous. It is not claimed that he did not act in good faith and use his best judgment. The defendants were certainly negligent in not answering more specifically and separately his two telegrams, one of which referred to the Learned

Brief for appellees.

cotton and the other to the Centerville cotton. Instead of answering these telegrams separately, appellees sent a message which, in any view of the case, was ambiguous and uncertain in its terms.

Even in the case of a special agent, if ambiguous instructions are given, the principal is bound by the agent's construction of them, if he acts in good faith. 1 Am. & Eng. Enc. L. (new ed.), 1001, (b) and notes; 91 N. Y., 185; 65 Iowa, 67.

In addition to what has been said, we submit that one cannot employ a broker or factor or auctioneer or the like and make him a special agent, even in respect to a single transaction. This is as old as the law of agency. 2 Am. & Eng. Enc. L. (old ed.), 577, and notes; 3 *Ib.*, 445; 12 Am. Rep., 45.

Wells & Croom, for the appellees.

Reed was a special agent of Thompson & Co., to do a particular thing which he never did or attempted to do. He was directed to buy from Watson & Smith, at Learned, their cotton, not over three hundred bales, at eight and three-sixteenth cents per pound, if he could not buy it at a less price.

The principal of a special agent is only bound by the acts of the agent which are strictly in accordance with his authority, and a third party is bound, at his peril, to ascertain the limit of the authority of the agent. 6 How. (Miss.), 345; 12 Smed. & M., 398, 403, 405; 53 Md., 28; 41 Conn., 421; 10 Bush, 632; 11 Met., 5; 72 N. Y., 279; 6 Smed. & M., 367; 58 Iowa, 301; 62 Iowa, 91; 27 Ala., 612; 29 Me., 404; 1 Pet. (U. S.), 290; 53 Ind., 184; 100 Mass., 74; 30 Vt., 599; 82 Mich., 336; 92 Mo., 113; 11 Mich., 139; 63 Vt., 127; 61 Cal., 216; 78 Ill., 553; 63 Tex., 348; 4 Am. St. Rep., 72; 9 *Ib.*, 147; 19 *Ib.*, 625; 21 *Ib.*, 567; 25 *Ib.*, 748; *Lawson's Rights, Remedies and Practice*, vol. 1, chap. 8.

A special agency exists where the authority is to do a single act. A general agency exists where the authority is to do all acts in any particular trade or calling. A person who is au-

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thorized by his principal to execute a particular deed, or to sign a particular contract, or to purchase a particular parcel of merchandise, is a special agent. One who is authorized to execute all deeds, sign all contracts or purchase all goods required in a particular trade, business or employment, is a general agent in that trade, business or employment. Story on Agency, sec. 17.

An authority to an agent to buy a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency; while authority to make purchases from any person with whom the agent may choose to deal, or to make an indefinite number of purchases, not having in view a single transaction, but a number of separate transactions, constitutes a general agency. *Butler v. Maples*, 9 Wall., 766; 19 *Ib.*, 822; 22 How., 75; 16 *Ib.*, 253; 1 Pet., 264; 9 Pet., 607; Story on Agency, sec. 32; Lawson's Rights, Remedies and Practice, vol. 1, chap. 8, and numerous authorities there cited. Usage will never be allowed to take preference over express instructions. *Scott v. Rogers*, 31 N. Y., 676.

STOCKDALE, J., delivered the opinion of the court.

This cause was commenced by attachment in the chancery court of the second district of Hinds county, to recover from appellees, nonresidents, about one thousand dollars, damages for losses on three hundred bales of cotton sold by appellants, as they alleged, to appellees, who refused afterwards to receive and pay for same, thereby compelling appellants to sell on a reduced market at a less price. The testimony, which we have carefully examined, is voluminous, and has been elaborately and learnedly discussed by counsel in connection with the law of agency. D. W. Reed was a cotton buyer for E. Johnson & Co., of Jackson, Miss., but had leave to buy for other people when his company was not in the market. He had applied to appellees to represent them, and they had declined to employ him. Some time afterwards, on the seventeenth of October,

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1895, appellees telegraphed Mr. Reed, at Utica, Miss., authorizing him to buy Utica and Learned cotton—not more than three hundred bales—at eight and three-fourth cents per pound; and if he could not get it at that, give eight and thirteen-sixteenths. That telegram is in the following language:

“NEW ORLEANS, LA., October 17, 1895.

“*To D. W. Reed, Utica, Miss.:*

“Try three-fourths; accept at thirteen-sixteenths; buy Watson & Smith, Learned; offered Smith three-fourths; not over three hundred; answer.”

Mr. Reed, finding he could not get more than one hundred bales at Utica and Learned, and wanting to buy and make commissions on three hundred bales, telegraphed to E. T. Stackhouse, at Centerville, Miss., another agent of E. S. Johnson & Co., to buy three hundred bales there; and, upon Stackhouse's reply, Reed telegraphed appellees that he had purchased three hundred bales at Centerville. Immediately upon receipt of that telegram appellees replied as follows:

“NEW ORLEANS, LA., October 17, 1895.

“*To D. W. Reed, Utica, Miss.:*

“Cannot use Centerville cotton; authorized purchase only at Utica and Learned; have written.”

This all occurred on October 17, 1895. Reed, having left Utica, did not get the last telegram until 8:30 on October 18, but went on to Centerville, and appellees repeated their telegram of the day before, that Reed had no authority to buy anywhere except at Utica and Learned. Appellants did not know Mr. Reed; never had seen him; did not know that the purchase was intended for appellees until the eighteenth, and then also learned that appellees denied Reed's authority to buy it and declined to take it. Appellees were not regular cotton buyers, but commission merchants, and bought cotton to keep

Brief for appellant.

in touch with their customers and keep their business. Reed was not their agent; had a special authority in this instance to buy cotton at Utica and Learned, and especially from Watson & Smith. He had never been held out as an agent by appellees, and they did not ratify his act, but promptly repudiated it. A special commission to buy certain property at a certain place, from men named, cannot be construed into an agency to buy at another and different locality, from other people, even if the property was of equal quality and value. Appellants had no dealings with appellees, and Reed was not their authorized agent in the transaction, and they are not liable.

The decree of the court below is affirmed.

SARAH BLACKBOURN v. SENATOBIA EDUCATIONAL ASSOCIATION.

RES ADJUDICATA. Decree. Construction. Widow's year's allowance. Code, 1892, § 1877.

If, in a suit by the widow and sole heir of a decedent to have his will adjudged invalid, a consent decree be rendered adjudging the will void as to real estate, but valid as to personalty, and decreeing that the widow be paid a certain sum of the proceeds of the personalty, and that the balance of the personalty be paid by the executor to the legatee, "subject to all proper costs, allowances, and expenses," such decree will bar an application by the widow for a year's support, under code 1892, § 1877.

FROM the chancery court of Tate county.

HON. B. T. KIMBROUGH, Chancellor.

The facts are stated in the opinion.

W. J. East, for appellant.

A judgment is conclusive only in matters directly in dispute and actually decided, and in order to prove these matters material, it must appear from the judgment that they were directly

Brief for appellees.

adjudicated. When a judgment is rendered, it only bars subsequent actions on matters actually settled by it. It does not matter if the judgment appears to determine other points; if it really does not, they are not barred. Any question incidentally considered, when irrelevant and not having any direct bearing upon the issue in the case, are not concluded. 21 Am. & Eng. Enc. L., 203. They (the issues), must have been relevant and pertinent to the case and within the pleadings. 21 Am. & Eng. Enc. L., 220, top of page.

G. D. Shands and *N. A. Taylor*, for appellees.

The position of appellees herein in resistance to the widow's application for a year's support, summarized, is as follows:

1. That said claim was included and settled in an agreed final decree in the chancery court rendered, September 5, 1895.

2. That if, for any reason, it should be held that the agreed decree, which has never been appealed from, nor effort made to have it reviewed, and if erroneous corrected, is not conclusive of this claim, then, for a number of other reasons, its rejection was proper. (a) The husband having amply provided, in his lifetime and out of his estate, for the wife's support, including the year succeeding his death, and then giving her, by will, all his exempt personal property, and more than that, and \$200 in money, and declaring therein, in substance, that "she was amply provided for," and these facts not being disputed, and that he "desired her to receive no more of this estate," this is not a proper case for such an allowance to be made. (b) That if it is a proper case for such allowance, notwithstanding the provision made by the husband in his lifetime, for the widow's support, and if the allowance should have been made to her by the court, or the appraisers, even without her application therefor, and it was omitted or refused, she should have objected to the appraisement, and sought its correction or a new appraisement, before its approval, and before the discharge of the appraisers, who, under the law, were to make it;

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or, if not then, certainly before the sale of all the personal property of the estate.

We rest with entire confidence upon our first proposition, that the allowance sought is barred by the former decree.

In reference to our second proposition we will say: A husband, knowing what the law will do with his property after his death, for the wife's support, that appraisers will be appointed to allot her a year's support in provisions or money, he can anticipate such action, or the necessity for it, and, by his own provision for her, meet the virtual requirements of the law, and render action by the appraisers unnecessary. This was done by the will in this case. Am. & Eng. Enc. L., note 2, p. 63, citing *Kersey v. Bailey*, 52 Me., 198; *Hollandale v. Pixley*, 3 Gray (Mass.), 521; *McManus' estate*, 14 Phila. (Pa.), 660, where it was held that the widow may be barred by express words in her husband's will, and acceptance under it of gifts in place of the exemption. The widow in this case, by delay, waived her right to the year's allowance. *Cook v. Ser-ton*, 29 N. C., 307; *Williams' appeal*, 92 Penn., 71; *Park v. Gleason*, 46 Penn. St., 301; *Hubbard v. Ward*, 15 N. H., 78; *Chandler v. Chandler*, 6 So. Rep., 183 and cases therein cited; 33 Tex., 483; *In re Machemer's estate*, 21 Atl. Rep., 441; *Appeal of Kern's*, 120 Pa. St. Rep., 523; *Vanderroot's appeal*, 43 Pa. St., 462; *Davis' appeal*, 34 Pa. St., 256.

STOCKDALE, J., delivered the opinion of the court.

A. L. Blackburn died in Tate county, at his home, November 1, 1893, leaving a will giving all his property, real and personal, except some small bequests, to the Senatobia Educational Association. Said will was probated by the chancery court of Tate county, and B. A. Tucker qualified as executor, who, as such executor, returned into court, on the seventeenth of November, 1893, an inventory and appraisement of said estate, which were approved at the March, 1894, term of said court, but a year's support was not set aside to the widow.

Opinion of the court.

On December, 1893, Mrs. Sarah Blackburn, the widow, and only surviving heir of A. L. Blackburn, filed her bill or petition in said court, seeking to have the said will declared void. Said cause was numbered 1,188 on the docket of said court. A demurrer being sustained to said petition, and the same dismissed, Mrs. Blackburn appealed the cause to this court, where the said will was held to be inoperative and invalid as to that part devising real estate to said institution, but valid, and to be upheld, as to the bequest of personalty, and to that extent the decree of the court below was erroneous, and was reversed, the demurrer overruled and the cause remanded. 72 Miss., 735.

When the cause got back to the chancery court of Tate county, the parties to the controversy, represented by their respective solicitors, formulated a decree to be presented to the court, and consented that the same be signed by the chancellor and entered as the judgment of the court, as a consent decree, reciting that the judgment of the supreme court had settled the principles of the controversy and providing and decreeing—

1. That the devise of his lands by A. L. Blackburn, deceased, to the Senatobia Educational Association is void.

2. That the bequest by said A. L. Blackburn of his personal property to said Senatobia Educational Association is valid.

The parties admit that the complainant, Sarah Blackburn, is the sole heir at law of A. L. Blackburn, deceased, wherefore, by consent of parties, it is ordered, adjudged and decreed as follows:

- “1. That the complainant’s petition be dismissed as to the personal property of said A. L. Blackburn, deceased.

- “2. That complainant, Sarah Blackburn, recover all the lands owned by said A. L. Blackburn at his death, and that the said A. L. Blackburn died seized and possessed of the following lands, . . . describing them.

- “3. That B. A. Tucker, executor of said A. L. Blackburn, deceased, pay the said Sarah Blackburn the net rents received by him from said lands for the years 1894 and 1895, which it is

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admitted amount to one thousand dollars (\$1,000), and for which he will, as executor, be allowed credit in his account and settlement.

“4. That of the avails of the personal effects and money of said decedent the said executor now pay to said Senatobia Educational Association nine thousand dollars (\$9,000), and to Mrs. Sarah Blackburn two hundred dollars (\$200), and that the residue of said avails are adjudged to belong to said Senatobia Educational Association, subject to all proper costs and allowances and expenses which may be awarded by the court in due course of administration.”

And that each party pay half the cost.

This decree was signed by the chancellor September 4, 1895, which decree is in evidence in this case.

On September 7, 1896, Mrs. Sarah Blackburn filed her petition, praying for one year's support to be allowed her and set aside to her, estimating the same at \$1,000, and objecting to the approval of the final account and discharge of the executor until that is done.

The Senatobia Educational Association answered said petition, alleging that said year's allowance was settled for in the consent decree of September, 1895.

It appears that there were no provisions or other property on hand from which the year's support could be taken when said consent decree was entered, but that the allowance must be in money, if at all. It appears from said consent decree that Mrs. Blackburn, knowing then that there was only money in the hands of the executor, or belonging to said estate, and that she then consented, and, upon her consent, it was adjudicated, as shown by the terms of said decree, that after paying her \$1,200 and the association \$9,000, “that the residue of said avails are adjudged to belong to said Senatobia Educational Association.” That was a disposition of the whole estate, as we think, except enough to pay costs, allowances, and expenses which may be incurred by the court in due course of administration, al-

Syllabus.

lowances, in that connection, evidently meaning allowances of commissions and whatever items that are required to be allowed by the court before payment can be made. The widow's year's allowance, secured to her by the statute, is not such an allowance as will be awarded by the court in due course of administration. Had it been the intention and understanding of the parties that the year's allowance was to be reserved to her, it would have been so provided, and not obscurely dropped in with costs and expenses. So far as the record in the cause shows, the widow herself acquiesced in that view for a year after the decree was rendered, with nothing to restrain her from proceeding in the court if she regarded herself entitled to the year's allowance.

The decree of the court below disallowing the petition of appellant for a year's allowance, and refusing to set aside the same to the said widow, Mrs. Sarah Blackburn, is

Affirmed.

FIRST NATIONAL BANK OF CHICAGO v. E. M. CAPERTON ET AL.

1. MORTGAGES. *Right of mortgagor. Consumptive use. Fraud on creditors.*

A mortgage, executed by a manufacturing company on its products, wherein is reserved to the mortgagor the right to keep, use and sell them in the usual course of business, is fraudulent as to the creditors of the mortgagor.

2. SAME. *Right of mortgagee. Seizure.*

Such a mortgage is not rendered valid by a provision that in case the mortgagor should sell the property, or any interest therein, that the mortgagee should take immediate possession for the purposes of the mortgage.

3. PLEDGE. *Possession.*

Possession of the property and good faith on the part of the pledgee are both necessary to constitute a valid pledge as against the rights of creditors of the pledgor.

Statement of the case.

FROM the chancery court of Coahoma county, first district.

HON. A. H. LONGINO, Chancellor.

The American Cooperage Company, a corporation doing business at Friar's Point, in this state, borrowed \$10,000 from Cyrus H. McCormick, and among other securities given for the loan, was a list of personal property, which was agreed to be pawned; whether this property was delivered so as to render the pledge valid was a controverted question in the case.

Afterwards the American Cooperage Company, being indebted to the First National Bank of Chicago, in the sum of \$35,000, and contemplating further indebtedness to it, executed and delivered to the bank two mortgages, the two, in the opinion of the court, constituting or evidencing but one transaction, upon substantially all of the property of the cooperage company, the mortgagor, embracing the product of its manufacturing plant. One of the mortgages contained the following provisions:

(1) "To have and to hold, all and singular the said goods and chattels unto the said mortgagee, its successors and assigns, to its and their sole use forever, and the mortgagor, as for itself and for its successors or assigns, does hereby covenant to and with the said mortgagee, its successors and assigns, that said mortgagor is lawfully possessed of said goods and chattels as of its own property, that the same are free from all incumbrance; that it will, and its successors and assigns shall, warrant and defend the same to it, said mortgagee, its successors and assigns, against the lawful claims and demands of all persons; provided, nevertheless, that if the said mortgagor, its successors or assigns, shall well and truly pay unto said mortgagee, its successors or assigns, any and all indebtedness now or hereafter existing, of any and every nature, of the party of the first part to the party of the second part; and, provided also, that it shall be lawful for the said mortgagor, its successors or assigns, to retain possession of the goods and chattels, and at its own expense to keep and use the same until its successors or

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assigns shall make default in the payment of the said sum of money above specified, either in principal or interest, at the date or times and in the manner hereinbefore stated.

(2) "And the said mortgagor hereby covenants and agrees that in case the mortgagee, its successors or assigns, shall feel insecure or unsafe or shall fear diminution, removal or waste of said property, or if the mortgagor shall sell or assign, or attempt to sell or assign, the said goods and chattels, or any interest therein, or if any writ or any distress warrant shall be levied on said goods and chattels, or any part thereof, then, and in any or either of the aforesaid cases, said mortgagee, its successors or assigns, or any of them, shall thereupon have the right to take immediate possession of said property, and for that purpose may pursue the same wherever it may be found, and immediately enter on the premises of the mortgagor, with or without force or process of law wherever the said goods and chattels may be or be supposed to be, and search for the same, and, if found, to take possession of and remove and sell and dispose of the said property, or any part thereof, at public auction to the highest bidder, after giving three days' notice of the time, place, and terms of sale, together with a description of the property to be sold, by notices posted up in three public places in the vicinity of such sale, or at private sale, with or without notice, for cash or on credit as the said mortgagee, its successors or assigns, agents or attorneys, or any of them, may elect; and out of the money arising from said sale to retain all costs and charges for pursuing, searching for, taking, removing, keeping, storing, advertising, and selling the said goods and chattels, and all prior liens thereon, together with the amount due and unpaid, rendering the overplus, if any remains, unto said mortgagor or its legal representatives."

E. M. Caperton and divers others, creditors, began suits upon their debts against the cooperage company, most of them suing in the circuit court, some in various justices' courts, and a few in the chancery court of the county. Judgments were obtained

Brief for appellant.

by several of the creditors who had sued in justices' courts, and they had levies made under executions on the property, or a part of it, which was embraced in the mortgages. This being the condition of affairs, the First National Bank of Chicago filed the bill in this cause, primarily to enforce its mortgages, but in aid thereof sought an injunction, and obtained a preliminary one, restraining levies on the property, and asked and obtained the appointment of a receiver to take charge of all the property and affairs of the cooperage company. Cyrus H. McCormick was, pending the cause, admitted as a party complainant to the suit, and he asserted, by an amended bill, a prior claim on that part of the effects in the hands of the receiver, which he claimed as having been pledged to him as a security for his debt. Caperton and the other creditors, defendants to the suit, jointly answered the bill and the amended bill, and made their answer a cross bill, insisting that the mortgages were executed to defraud creditors and void, and that McCormick never took possession of the property which he claimed in pledge, and had no superior right, and prayed that the receiver be required first to pay them out of the proceeds of the property. The court below decreed the mortgages void, but adjudged McCormick's pledge valid. The First National Bank of Chicago, the original complainant, appealed, and Caperton and other creditors and original defendants, also appealed, complaining of the decree in so far as it was favorable to McCormick.

D. A. Scott, for appellant, the First National Bank of Chicago.

Upon a state of facts much stronger than the state of facts developed by the evidence in this record, the supreme court of this state has, on more than one occasion, refused to declare as fraudulent and void, either in law or in fact, mortgages conveying property consumable in its use. This, for the manifest reason (as we maintain in the case here), because the instruments

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did not, in express and unequivocal language, reserve the right in the mortgagor to sell the property; they did, however, convey property consumable in its use, and expressly provided in the face of the instruments that the mortgagor should have the right to retain possession of the property and use it. In one of the cases the property conveyed was logs and lumber. And, in the instrument of writing under which these logs and lumber were conveyed, there was a stipulation to the effect that the mortgagor should retain possession of the property, and, in his discretion, to use it, to convert it into lumber, and, yet, our court very properly held that this instrument was not fraudulent and void upon its face, because, as above stated, it did not, in express and unequivocal language, reserve the right that the mortgagor should have the authority to sell the property in the usual course of trade. Such being the law of this state upon the subject as to whether a mortgage upon property consumable in its use is fraudulent and void upon its face, it follows, as a natural and legal sequence, that in order to condemn such an instrument as fraudulent and void in fact, there must be clear and undisputable proof that there was an express agreement between the mortgagor and the mortgagee, dehors the mortgage, by which the mortgagor was authorized not only to use the property, but to sell it, convert it into money, and use it in the usual course of his business.

The reason assigned by our court for not condemning the instrument considered in *Hitchler v. Bank*, 63 Miss., 403, was because of the absence of an express agreement or authority contained in the face of the mortgage, to sell or dispose of the property therein described and conveyed. Manifestly, the property conveyed in that mortgage was as consumable in its use as the property involved in this suit. Chief Justice Cooper says: "The mortgage executed to secure the debt of Black is not void merely because it includes the saw logs, which, from time to time might be brought on the mortgaged premises. There is no authority reserved by the mortgagor to sell these logs, or

Brief for appellees.

the lumber into which they might be converted. It would not be a violent presumption to indulge that such was the understanding of the parties, but it does not unmistakably appear that it was, and it is only where the reservation of such right is expressly reserved that the conveyance is to be declared void on its face. It does not appear by the evidence that any of the mortgaged property was, in fact, sold by the mortgagor, nor that there was any agreement in reference to it, other than that appearing in the deed."

Chief Justice Cooper, in commenting upon the validity of another mortgage, says: "The mortgage executed by Nalty, to secure the debt due to Britton & Mason, was not fraudulent on its face, for though it is strongly suggestive that it was contemplated by all parties to it that Nalty should continue to dispose of the goods mortgaged in the usual course of trade, there is no express reservation of that right. We cannot say that the power is so clearly reserved to sell the goods that no evidence negating that right could be introduced. It is only where the conveyance so unmistakably reserves the right to the mortgagor to deal with the property mortgaged as his own that all evidence to the contrary should be excluded, as contradicting the writing, that the court can declare the deed fraudulent in law." *Britton & Mason v. Criswell*, 63 Miss., 394.

Sam C. Cook, for appellees, Caperton and others.

The mortgages provide in specific terms that the mortgagor "shall keep and use" the property conveyed. The property conveyed consisted of raw, partly manufactured, and manufactured cooperage material. This property was all consumable in its use, and "to keep and use" the same, destroyed the validity of the mortgage. *Acme Lumber Co. v. Hoyt*, 71 Miss., 106; *Harman v. Hoskins*, 56 Miss., 142. We could cite numerous Mississippi decisions announcing this doctrine, but the rule is too well established to require other citations.

It is contended that the provision in the mortgage whereby

Brief for appellees.

a forfeiture thereof may be declared by the mortgagee in the event that the mortgagor should sell or dispose of the property conveyed, necessarily prohibits the sale of the same by the mortgagor. We do not think that this position is maintainable. All parts of the instrument should be taken in connection with other portions of the mortgage, in order that the same may be properly construed as a whole. Every provision of the mortgage must be given effect, and seemingly inharmonious provisions must be harmonized if possible.

We submit that the mortgage as a whole means that the mortgagor was authorized "to keep and use," to sell and dispose of, the property conveyed, in the ordinary course of its business; but should the mortgagor attempt to sell or dispose of the property, except in the ordinary course of its business, then the conditions would be broken, and the mortgagee was authorized to declare the same forfeited. Any other construction of the instrument would defeat one or the other of these seemingly conflicting powers.

Cook & Yerger, on the same side.

The provision in the chattel mortgage providing the mortgagor "may keep and use" the property conveyed, rendered both mortgages void as to creditors, they both being given to secure the same debt, contracted at the same time, and, in the language of Mr. Gage, they are practically contemporaneous, and, therefore, one and the same instrument from a legal standpoint of construction. *Harmon v. Hoskins*, 56 Miss., 142. Admitting that the clause in the chattel mortgage, above referred to, does not necessarily imply that the mortgagor was to have the right to sell the property mortgaged, nevertheless, it is clear from the course of dealings between the parties, as disclosed by the depositions of Gage and Charnley, that this right was conferred upon the mortgagor or at least contemplated, and, in fact, tacitly agreed upon. The authorities are clear that a tacit agreement will bind the parties. *Hangen*

Brief for cross appellants.

v. *Hachemeister*, 114 N. Y., 556; *Russell v. Winne*, 37 N. Y., 591.

J. W. Cutrer, on the same side.

The mortgages seem to us to be fraudulent (1) because of the fact that they seek to secure an indebtedness to the mortgagee then due, and which was definitely known, and yet failed to describe such indebtedness; (2) because the two instruments were contemporaneous, and are therefore one and the same, the chattel mortgage covering property which is consumable in its use, and, by express stipulation, the mortgagor is given the right to retain possession of such property, and to keep and use the same; (3) because, as a matter of fact, the mortgagor was permitted to use, sell, and dispose of the mortgaged property (which by the terms of the mortgage it was stipulated should remain in the mortgagor's possession) in the usual and ordinary conduct of its business. *Britton v. Criswell*, 63 Miss., 394; *Hitchler v. Bank*, 63 Miss., 403; *Acme Lumber Co. v. Hoyt*, 71 Miss., 106; *Harmon v. Hoskins*, 56 Miss., 142; *Joseph v. Levi*, 58 Miss., 843; *Bank of Hazelhurst v. Goodbar*, 73 Miss., 566.

J. W. Cutrer, for cross appellants, Caperton and others.

We contend (1) that there was no delivery of the possession of the property claimed originally to have been pledged to Haynes for McCormick; (2) if there was, Haynes was not a capable person to accept and hold possession of the property for McCormick, being one of the principal managing officers of the cooperage company; (3) that the contract of pledge itself is invalid, by reason of the agreement that the cooperage company was given the right, at will, to withdraw the pledged property and substitute other property in the place thereof, using the property so withdrawn in the ordinary conduct of the business and in the due course of trade. *Jones on Pledges*, secs. 23, 40; *Citizens' Bank v. Jennen*, 46 La. Ann., 995;

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see, also, 17 So. Rep., 471; Jones on Pledges, secs. 23, 24; *Casey v. Caveroc*, 96 U. S., 464; *Sidenback v. Reily*, 111 N. Y., 560; *Conrad v. Fisher*, 8 L. R. A., 147.

Edward O. Brown, for appellee, McCormick.

We claim distinctly under a pledge. We claim that this pledge was made effective by the intention of the parties and their actions in pursuance thereof; that the merchandise, the proceeds of which have been given to us by the decree of the court below, was taken possession of in pursuance of the pledge to McCormick, through his agent, and that neither the fact that such agent was an officer of the corporation which pledged the goods, nor that in pursuance of his authorization a portion of the merchandise first pledged was redelivered to the pledgor in return for other stock of the same nature and value, should be held to invalidate the pledge. In support of our contention, we offer the following legal propositions and citations.

The essential elements of a pledge are transfer of possession to the pledgee and the right of the pledgor to redelivery on payment of the debt at any time before the power of sale has been exercised. The terms of the pledge may be such that the legal title passes to the pledgee. *Wilson v. Little*, 2 Comst., 443-447; 18 Am. & Eng. Enc. L., 588-590. It certainly cannot be necessary to press the proposition that, although a pledge requires a delivery of the property pledged to the pledgee, that delivery may be constructive. In the case of bulky articles inconvenient to move, it must almost always necessarily be so. No one would deny in these days, I presume, that the delivery of the key of a warehouse may be a constructive delivery of all the goods therein. And so logs in a boom are delivered by their merely being pointed out. A transfer of a warehouse receipt is delivery of goods pledged thereby. 18 Am. & Eng. Enc. L., 595, note 8; Jones on Pledges, sec. 36; *Jewett v. Warren*, 12 Mass., 300-302; *Wilkes v. Ferris*, 5 Johns., 335-344.

Brief for appellee.

All the elements of a delivery of the property under discussion in this case appear. Had McCormick, instead of being approached for a loan, come to Friars' Point in search of cooperage stock, bought the property in question and requested Mr. Haynes to take and keep possession of it until he wanted to move it, soliciting and receiving a lease of the land upon which it stood and marking it McCormick upon the edge of the piles, there certainly could be no doubt that it had been segregated sufficiently to be absolutely and safely his property, and subject to his order. The same tests are applicable in the case of a pledge.

Where a sale, absolute in form, is made merely as security for a note, the bill of sale, being a mere bill of parcels, is subject to explanation by parol evidence. *Walker v. Staples*, 5 Allen, 34. Substantially to the same effect are *Beidler v. Crane*, 135 Ill., 92, 99; and *Benton v. Thornhill*, 7 Taunton, 149.

I cite these cases to a familiar proposition because there appear in the record objections by the appellants to the introduction of evidence to explain the bill of sale and the lease, and the nature of the contract between McCormick and the American Cooperage Company. The law in a case like this, where the note, the absolute bill of sale and the lease are contemporaneous, would not only allow, but demand, an explanation. Actual possession by the pledgor as bailee or agent of the pledgee, does not vitiate the pledge. *Reeves v. Capper*, 5 Bingham (N. C.), 136, 140; *Martin v. Reid*, 11 Common Bench (N. S.), 730, 734; *Thompson v. Smith*, 11 Hum., 396, 400; *Goldstein v. Nunan*, 66 Cal., 542; *Macomber v. Parker*, 14 Pickering, 497, 505, 508, 509; *Melody v. Chandler*, 3 Fairfield (12 Me.), 282.

Again, it is further to be noted that if actual possession is in the pledgee, while to all the world outside there is apparent possession in the pledgor, the pledge is not necessarily vitiated, nor subject to defeat by creditors. *Benton v. Thornhill*, 7 Taunton, 149; *Hilliker v. Kuhn*, 71 Cal., 214.

Brief for appellee.

A pledgor may be employed by the pledgee to sell the pledged goods. A valid pledge may be effected by delivery to an employe of the pledgor as agent of the pledgee, the goods being kept on the pledgor's premises, and portions of them being delivered to the pledgor, from time to time, on payment of the corresponding parts of the debt. *Combs v. Tuchelt*, 24 Minn., 423, 426; *Weems v. The Delta Moss Co.*, 33 La., 973; *Jacquet v. Creditors*, 38 La., 863. And not only, in such a case, may the pledge be effective when the goods are kept on the pledgor's premises in a separate room, they may be kept in the same room with other goods of the same kind belonging to the pledgor without invalidating the pledge. And if, in pursuance of agreement, these goods are afterwards given up to the pledgor, and sold by him, other goods specifically appropriated in their stead by the employe of the pledgor, who acts as agent for the pledgee, come under the effect of the same pledge and cannot be subject to attachment by creditors of the pledgor, even though, at the time the conflicting attachment is levied, some of them are still unfinished. *Sumner v. Hamlet*, 12 Pickering, 76, 81-83; *Allen v. Smith*, 10 Mass., 308; *Abbott v. Goodwin*, 20 Me., 408, 412; *New York Security & Trust Co. v. Lippman*, 36 N. Y. Sup., 355.

D. A. Scott, on same side.

As to what constitutes a sufficient delivery, under the law of pledges of personal property, in addition to the authorities cited by Mr. Brown, I refer to 18 Am. & Eng. Enc. L., 595, and notes.

If agreements fail, by reason of inadvertence or mistake, to express the true intent of the parties, courts of equity should and will grant relief. *Hall v. Lafayette County*, 69 Miss., 529.

Whenever an instrument conveying property is intended as security, an equitable lien is established. 1 Story's Eq. Juris., sec. 1018; *Maynard v. Cocke*, 71 Miss., 493.

In case of debt a pledge is preferred to a mortgage, but con-

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tracts will always be construed so as to effectuate the true intent of the parties. 18 Am. & Eng. Enc. L., 592, 598, and notes.

All instruments of writing should be so construed as, if possible, to sustain their validity. The presumption of an attempt to defraud is not to be indulged. The contrary is the legal intendment, which must prevail until it is overcome by reasonable certainty that the thing complained of is such as the law condemns. *Mattison v. Judd*, 59 Miss., 99.

WHITFIELD, J., delivered the opinion of the court.

The mortgage of October 25, 1894, to the First National Bank, on its face reserves the right to the mortgagor to "keep and use" the property. This avoided the instruments, both constituting one transaction. *Acme Lumber Co. v. Hoyt*, 71 Miss., 106. The property was largely consumable in its use. It is said that the subsequent provision that in case the mortgagor should sell or assign said property, or any interest therein, that the mortgagee should take immediate possession, etc., saves the instrument. But the "use" first referred to clearly is the usual use in the ordinary course of business, and the latter provision relates to a selling out of the business, otherwise than at retail, in such ordinary course of business; and a clause providing for such selling out at retail, as usual (Jones on Chat. Mort., sec. 458, note 1), cannot be permitted. It would operate a fraud on those who gave credit to the mortgagor on the faith of apparent ownership, serving the purpose of continuous cover. The provisions invoked in *Hitchler v. Bank*, 63 Miss., 403; in *Britton v. Criswell, Id.*, 394; and in *Baldwin v. Little*, 64 Miss., 126, were all in the granting clause of the instruments in those cases, and not, as here and in Hoyt's case, *supra*, in the clause reserving control to the grantor. The decree on the appeal of National Bank of Chicago against Caperton *et al.* is therefore affirmed, as the right result was reached. As to the evidence, it is only necessary to say Charnley, the president of the American Cooperage Company,

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said he expected to continue the business as usual, and that it very clearly shows that the grantor was selling out in the usual course of business, certainly up to October 30, though Gage says he did not know anything as to this, admitting, however, that the forbearance of the mortgagee doubtless permitted this to be done.

On the appeal of E. M. Caperton *et al.* against Cyrus H. McCormick we find ourselves, after repeated examinations of the record and of the many authorities cited, unable to concur with the learned chancellor. The possession was too equivocal, looking to the constant substitutions and the whole evidence touching the character of the possession. Jones on Pledges, sec. 40, *et seq.*; 18 Am. & Eng. Enc. L., 597, and note 4; *Nisbit v. Trust Co.*, 4 Woods, 470 (12 Fed. Rep., 686); *Trust Co. v. Trumbull*, 137 Ill., 146 (27 N. E., 24); *Casey v. Cavaroc*, 96 U. S., 467. In this last case, as here, all the money arising from the sale of the originally deposited securities went to the bank, and not to the pledgee. It may be conceded that McCormick acted in perfect good faith. But the presence of good faith cannot supply the lack of the character of possession essential to the existence of a pledge. As well said by Mr. Justice Bradley in the case last cited: "Bad faith would defeat the pledge, though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge, so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods." The case of the Champagne Wines, cited by Justice Bradley (p. 484), is squarely in point here. There was no substitution in the case of *Bank v. Harkness* (W. Va.), 24 S. E., 548. The case of *Abbott v. Goodwin*, 20 Me., 411, is in conflict with our decisions, unless the distinction that the proceeds of the

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goods sold were to be paid to the mortgagee, and were so paid, distinguishes it; and that distinction cannot aid appellees, because here the proceeds went to the pledgor. In *Sumner v. Hamlet*, 12 Pick., 76, the strongest case learned counsel for the appellees has cited, it seems there was a new and independent arrangement and contract, both as to the debt and the pledge, made in October, 1829, and the forty-five pieces of flannel selected under the new contract were never substituted. In *Combs v. Tuchelt*, 24 Minn., 423, all the unstamped cigars which the pledgor got from Mann, the agent of the pledgee, were paid for, and the money paid to the pledgee, so that the lien of the pledge attached only to the unsold part, which was never substituted. In *Allen v. Smith*, 10 Mass., 308, the possession, designated by stakes and marks, was visible and notorious, and there was no substitution; and *Hilliker v. Kuhn*, 71 Cal., 214 (16 Pac., 707), merely holds that a mere temporary charge of the pledge by the pledgor, after delivery to the pledgee, to assist the pledge holder, does not invalidate the pledge. Of course, delivery may be according to the nature of the thing delivered—as, of the contents of a warehouse by delivery of the key or of a warehouse receipt, or as by delivery of bill of lading, or as by pointing out logs in a boom, etc. We are not speaking specially here of the mere delivery of the original material; but, on the whole evidence, it seems to us clear that the claim of Mr. McCormick cannot, under “the inexorable rule of law” as to the character of the possession, be upheld.

The decree on the appeal of Caperton et al. against McCormick is therefore reversed, and the cause remanded for a decree below in accordance with this opinion.

Brief for appellant.

CITY OF NATCHEZ v. CATHARINE H. S. SHIELDS.

MUNICIPALITY. *Defective street. Liability. Notice.*

A municipality is liable for an injury suffered by the occupant of a carriage because of defects in its street of which it had due notice.

FROM the circuit court of Adams county.

HON. W. P. CASSEDY, Judge.

The facts are stated in the opinion.

Mayes & Harris, for appellant.

It was error in the court below to admit testimony in respect to the general condition of the street railway track, and in respect to specific instances of defects in the track in other places than that of the accident; and also to give instructions to the jury turning upon that sort of testimony. The question in this case is specific; that is to say, was or was not the plaintiff injured by a certain defect in the street? If so, was the city chargeable with knowledge of the existence of that particular defect and under obligation to repair it? The plaintiff was not injured by the general condition of the railway track, nor was she injured by the particular defects at other places than the scene of the accident. The question before the court was not one of habit. It was not one of continuous negligence. But the question was specific and single. See *Richards v. Oskosh*, 81 Wis., 226; *DuBois v. Kingston*, 102 N. Y., 219; *Collins v. Dorchester*, 6 Cush., 396; *Phillips v. Willow*, 70 Wis., 6; *Matthews v. Cedar Rapids*, 80 Ia., 459; *Kidder v. Dunstable*, 11 Gray, 342; *Parker v. Publishing Co.*, 69 Me., 173; *Elliot on Roads and Streets*, 463, 646; *Henckley v. Barnstable*, 109 Mass., 126; *Railway Co. v. Gilbert*, 46 Mich., 176; *McGuire v. Railway*, 115 Mass., 239.

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Martin & Conner and W. T. Martin, for appellee.

The reporter does not find a brief for appellee on file.

STOCKDALE, J., delivered the opinion of the court.

At the November, 1896, term of the Adams county circuit court, judgment was rendered in this case for plaintiff in the sum of \$1,500, on the verdict of a jury, a motion for a new trial overruled, and defendant appealed here.

Miss Catharine H. S. Shields sued by her next friend, J. Surget Shields, the city of Natchez for injuries received by her and inflicted upon her person as the result of the negligence of the city in allowing a street railroad to be and remain out of repair and in an unsafe condition. The record shows that in April, 1896, the appellee, a young lady in her fourteenth year, was riding into the city of Natchez in her mother's carriage, and, when crossing one of the street railways of appellant, one of the rails of the railway caught in the wheel of the carriage and suddenly and abruptly precipitated Miss Shields forward against and upon the iron guard around the back of the front seat of the carriage, by which she was injured so severely that she suffered agonizing pain for a week or ten days, and was confined to her bed for five or six weeks, and still suffers pain occasionally. It is abundantly established by the proof that the railroad track was defective and out of repair. The very rail that caused the accident, and consequent injury to the young lady, had been loose for weeks, and while it had been spiked down once or twice, it was a flat piece of iron laid on timbers which would not hold the spikes, and the city authorities had knowledge of the condition of this road and track. The mayor of the city himself testified that frequent complaints had been made to him of the bad condition of the track, and he had ordered the proper officer to look after it and see that it was repaired and the defects remedied. We have no fault to find with the verdict, and do not find in the record any reason to disturb the finding of the jury.

The judgment of the court below is affirmed.

Brief for appellant.

JAMES ROBERTSHAW v. BRITTON & KOONTZ.

1. PLEADING. *Evidence.*

If a plea be held good by the court on demurrer, and the plaintiff has replied to the same traversing its averments, evidence of the facts stated in the plea is admissible, and ought not to be excluded on the idea that if proved they do not constitute a defense.

2. PROMISSORY NOTE. *Code 1892, § 3503.*

A plea that the note sued upon was executed upon the payee's promise to credit the amount upon another note for a larger sum previously executed, and which the payee represented he still held, but which he had, in fact, transferred, and that the larger note had been paid, presents a defense, under code 1892, § 3503.

FROM the circuit court of Washington county.

HON. F. A. MONTGOMERY, Judge.

The facts are stated in the opinion.

J. H. Wynn, for appellant.

The amended plea sets up not only a failure of consideration, but that the payee falsely represented himself to be the holder of the original note. There was not only the defense of a failure of consideration, or, rather, want of consideration, but also of fraud by the payee, which vitiated the note in the hands of any subsequent holder.

The holder of the \$3,500 note could have claimed that appellant had a perfect defense to the note sued on, executed without consideration, and fraudulently obtained, and should not be allowed to set it up as a defense to the \$3,500 note. The plea clearly shows that the \$3,500 note was not paid *pro tanto*, or not affected in any other way, and not to be effected until this credit was made upon its back. It was clearly intended that the \$3,500 note should show this credit, and, until this credit was entered upon it, it was binding. It is clear that, if this

Brief for appellee.

suit were by the payee, he would have no standing, because he would be attempting to take advantage of his failure to carry out his contract, and of his own false representations; and, under our statute, the appellees are on the same plane with him.

The record shows that the plaintiff had taken issue upon the amended plea; had gone to trial thereon, and had offered the deposition of Dunbar to disprove the facts there alleged, and it was too late to claim that the plea offered no defense. When the court overruled the demurrer to the amended plea, and the appellees had taken issue upon it, the law of the case was settled and the court should not have, in effect, sustained the demurrer which had formerly been overruled, by excluding the testimony of Robertshaw, and granting the peremptory instruction.

Fred Clarke, for appellee.

The appellees are *bona fide* holders, for value, of the note sued on, having acquired the same without notice of any offsets or counter demands against it on the part of the appellant. If the statements in the special plea were taken to be true, the note sued upon would be a mere piece of accommodation paper, and it is a well-settled doctrine of this state that the anti-commercial statutes, § 3503 of the annotated code, does not apply to paper of this character. *Megget v. Baum*, 57 Miss., 22; *Millsaps v. Bank*, 71 Miss., 361. If the case had proceeded to judgment on the issue joined, and the jury had found in favor of the defendant, Robertshaw, upon the special plea, the court would not have been justified in sustaining that verdict, but should have vacated it and awarded a new trial, for the simple reason that the special plea raised no valid defense to the action. Why, then, should the court allow testimony to go to the jury upon an issue which raised no valid defense to the suit? The fact that a demurrer to the plea had been overruled would make no difference, since the plea, being allowed to stand, presented no valid defense. Upon this view of the case, appellees say that the judgment in their favor is correct.

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STOCKDALE, J., delivered the opinion of the court.

On November 22, 1889, James Robertshaw executed his promissory note, of that date, whereby he promised to pay to the order of R. F. Dunbar the sum of \$1,500, six months after date, with ten per centum interest from maturity. R. F. Dunbar indorsed this note to the order of Britton & Koontz, who bring this suit to enforce its payment.

James Robertshaw pleaded the general issue, also a special plea, at the May, 1895, term of said court. To the special plea a demurrer was interposed and sustained by the court, and leave granted to amend the special plea.

At the November term, 1895, defendant filed an amended plea, setting up want of consideration, alleging that prior to the time of the execution of the note sued on, defendant and his wife had executed and delivered to the said R. F. Dunbar their promissory note, payable to him, for \$3,500, and Dunbar represented to them that he then held said \$3,500 note, and would credit the same with the face value of the \$1,500 note here sued on; but that, at the time of the execution of the note sued on, said note for \$3,500 was not held nor owned by said Dunbar, but was outstanding.

To this plea a demurrer was overruled, and plaintiffs replied to it, denying the agreement set forth in the plea, and that plaintiffs were without notice of any such agreement, and that Robertshaw knew, at the time of the execution of the note sued on, that Dunbar had parted with said \$3,500 note, and that he did not own nor control it.

At the December term, 1896, of said court, the parties went to trial on the issue raised by said pleas to the declaration. R. F. Dunbar testified, by deposition, that there was no agreement nor promise nor understanding that said note sued on should be credited on the \$3,500 note; that the note sued on was given for money owed him by Robertshaw, and that the \$3,500 note had been discounted before that, and the money paid to Robertshaw, and he had gotten the full benefit of said note.

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James Robertshaw was introduced by defendant, and testified that he was the defendant and maker of the note sued on. He was then asked to state what were the facts about the allegations set forth in his special plea, filed by him as to the credit to be applied on the back of the \$3,500 note. Plaintiff objected to the testimony being introduced, for the reason that the plea does not show a good defense to the action. The court sustained the objection, and defendant excepted.

The defendant then asked leave to amend his plea so as to show that the original \$3,500 note was secured by a deed of trust upon land, and that the same had been foreclosed and the land sold thereunder by the trustee prior to the institution of this suit, which amendment the court refused to allow, and defendant excepted.

Mr. Robertshaw, being recalled, was asked to state to the court and jury whether the facts set forth in his special plea, filed December 3, 1896, are true, to which question the court sustained an objection, holding that the facts set up in said plea constituted no defense, and no testimony would be allowed to sustain it. Instructions having been given in line with the above recited rulings, verdict and judgment were rendered for plaintiff for \$2,625. Defendant moved for a new trial for causes: (1) The court erred in sustaining demurrer to special plea; (2) the court erred in excluding testimony of Robertshaw; (3) the court erred in refusing to allow defendant to amend his plea; (4) the court erred in granting the peremptory instruction. This motion being overruled, defendant appealed.

Counsel for appellant contends that when the court overruled the demurrer to the special plea, and gave plaintiffs sixty days to reply, and they did reply, denying the allegations of said plea, the law of the case for that court was settled, and the court should not, in effect, have sustained the demurrer that had been overruled at a former term. There seems to be no answer to this contention. The plea was filed as an answer to the whole action, and the court held it to be good, as such an-

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swer, by overruling the demurrer to it, and then to refuse to allow evidence to prove it after issue had been joined, was manifestly error. Defendant had the right to prove his plea in the then state of the pleadings.

Had the defendant testified to the truth of his plea, as he offered to do, there would have been such a conflict of testimony with the testimony of plaintiff already in, as would have rendered the peremptory instruction erroneous.

The contention of counsel for appellees that plaintiffs are *bona fide* holders of the note sued on, cannot avail, in view of § 3503 of the code of 1892. If the defendant had a good defense, and if the special plea be true, there was not only want of consideration, but the note sued on was obtained by misrepresentation and fraud, the \$3,500 having been previously transferred, making a good defense against Dunbar, which may be interposed as against plaintiffs.

The contention of appellee's counsel that appellant cannot defend this suit unless he had immediately paid the \$3,500 note, is met by the fact that he asked leave to amend his plea so as to allow him to prove that it had been paid by sale of lands, and was denied by the court.

We do not concur in the contention that the facts set up in the special plea would constitute the note sued on accommodation paper. For these reasons we think a new trial ought to have been granted.

The judgment of the court below is reversed, a new trial granted, and the cause remanded.

Brief for appellant.

DOWDEN HOLLEY v. THE STATE OF MISSISSIPPI.

1. JUSTICE OF THE PEACE. *Criminal practice. Entry of judgment.*

If a justice of the peace tries a criminal case, of which he has jurisdiction, and enters his judgment on a loose piece of paper, and, after his court adjourns, transfers the entry to his docket, the judgment is not invalid.

2. SAME. *Transfer of cause. Another justice.*

If an affidavit is made before a mayor, charging defendant with a misdemeanor, and the mayor transfers the affidavit and the prisoner to a justice of the peace, who tries the defendant and convicts him, without objection to the latter's jurisdiction, the defendant cannot, upon appeal to the circuit court from such conviction, dismiss the prosecution because of irregularity in the transfer, or the want of an order on the mayor's docket making it.

3. SAME. *Jurisdiction.*

If a justice of the peace has jurisdiction of the subject-matter of a criminal prosecution, the defendant waives the question of the jurisdiction of his person by pleading not guilty and going to trial.

FROM the circuit court of Pontotoc county.

HON. NEWNAN CAYCE, Judge.

The opinion states the facts.

C. B. Mitchell, for appellant.

I respectfully submit that the justice of the peace, Pitts, before whom this case was tried, had no jurisdiction of the case, for, in fact and in law, there was no change of venue from the mayor's court to the court of said Pitts. The affidavit in this case was made out before W. M. Huntington, mayor *pro tem.* of the town of Pontotoc, and, without entering the case on his docket, without any affidavit being filed setting forth sufficient grounds to warrant a change of venue, without any motion before him asking for a change of venue, without

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entering any order whatever on his docket in reference to a change of venue, he proceeded to send the original affidavit and papers, together with the prisoner, to the court of justice of the peace Pitts. I submit that such unwarranted action on the part of the mayor *pro tem.* was illegal, and in no view constituted a change of venue.

Wiley N. Nash, attorney-general, for the appellee.

The defendant, Holley, was arraigned before Pitts and tried by him on the original papers. He did not object to the jurisdiction of the court.

The law does not require a justice of the peace to write up his docket in open court and in the presence of the defendant. The memorandum taken at the time was sufficient.

The simple transfer of a misdemeanor, as was done in this case, was not a change of venue in any sense, and the law touching a change of venue has no application. Both officers, the mayor and the justice of the peace, had jurisdiction of the offense. Certainly Pitts, as a justice of the peace, had jurisdiction of the crime.

STOCKDALE, J., delivered the opinion of the court.

The appellant was convicted by the jury, in the circuit court of Pontotoc county, of carrying, concealed, a deadly weapon, and sentenced by the court to pay ten dollars fine and to be imprisoned thirty days, and he appealed from that sentence. The defendant moved to arrest the judgment because the justice of the peace court, from which the cause came to the circuit court by appeal, was without jurisdiction to try the case, and consequently the circuit court had not jurisdiction.

The motion was based on the fact that affidavit was made before W. M. Huntington, mayor *pro tem.* of Pontotoc, and warrant issued by him for defendant, and he was arrested on said warrant and brought before said mayor *pro tem.* for trial; and the said mayor *pro tempore* undertook to transfer the case and the defendant to W. H. Pitts' justice of the peace court of

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the same district, and sent the prisoner and original papers to the court of Justice Pitts, making no entry on his own docket either of the arrest or transfer.

Justice Pitts proceeded to arraign the defendant on the original affidavit sent over by the mayor, and tried and convicted him, and sentenced him to thirty days' imprisonment and to pay \$10 fine. From that sentence the accused appealed to the circuit court. After the record was completed the defendant moved the court to quash the affidavit and discharge the prisoner, because the court of Justice Pitts had not jurisdiction to try or sentence the prisoner, there being no regular transfer of the cause from the court of the mayor of Pontotoc, no order on said mayor's docket transferring the case, and no affidavit for removal filed. Because the judgment of the justice of the peace court was not entered on the regular docket in the presence of the accused, but on a piece of paper and entered on the docket after the adjournment of the court, after the justice of the peace arrived at home. The court overruled that motion, and, upon conviction, defendant was by the circuit court sentenced to thirty days' imprisonment and to pay \$10 fine, and from that sentence appealed to this court. This court has held—*Lunenberger v. The State, ante*, 379—that it is not error, at least not reversible error, for a justice of the peace to perform the mere clerical act of entering the judgment on his docket after the cause had been tried, even after the court had adjourned. There is no particular mode prescribed for the transfer of causes by the justices' courts, and great liberality is necessarily allowed to justice of the peace courts in the matter of pleading and practice. Justice Pitts had original jurisdiction of the subject-matter, and when this prisoner was arraigned in his court he pleaded and was tried, without objecting to the jurisdiction of his person, and that completed the jurisdiction of the justice court. The record shows a fair trial in the circuit court on the merits.

The judgment of the court below is affirmed.

Brief for appellant.

WILLIAM CRAIG v. A. H. PATTISON.

1. PRIVILEGE TAX. *Store. Code 1892, § 3390. Laws 1896, sec. 2, p. 50.*

The fact that merchandise kept for sale is so kept partly in a dwelling and partly in a smokehouse, does not exempt the owner from liability to a privilege tax upon a "store," under code 1892, § 3390 and laws 1896, sec. 2, p. 50.

2. SAME. *Landlord. Tenants. Farmer.*

A farmer who keeps merchandise at his farmhouse for sale at retail at a profit, though he sells only to his tenants, conducts a "store," and is liable to a privilege tax under the statute.

3. SAME. *Evidence of value.*

If it be shown that goods were sold from a store, and that privilege tax was not paid thereon, and there be no evidence of the value of the stock, other than the value of the goods so sold, there can, under the statute, be no recovery for the goods, since a privilege tax of some amount is imposed upon all "stores."

FROM the circuit court of Tallahatchie county.

HON. F. A. MONTGOMERY, Judge.

The facts are stated in the opinion.

Eskridge & Dinkins, for appellant.

We think the proof abundantly shows that the defendant was a storekeeper in the ordinary sense of that term, and certainly as contemplated by the revenue act of 1896 and the decisions of this court. The evidence shows that the defendant kept her groceries, snuff, tobacco, soap, etc., in her "smokehouse," and her dry goods in the west room of her dwelling house, and some of them arranged on shelves, as in regular stores.

The plaintiff shows that all the articles charged against him in her account were bought from the defendant. An examination of the account will disclose that twenty-four different varieties of articles are enumerated in it. A pretty large variety

Brief for appellee.

for one who claims to have no store. It does not matter that defendant kept her goods for sale in her smokehouse and in the west room of her dwelling; the revenue law will as effectually reach and operate on her as it would in open market. The word "store," as used in the act, is intended to designate any place where goods are deposited and sold by one engaged in buying and selling goods. *Folkes v. State*, 63 Miss., 81. "The word, 'store,' means a place where goods are kept on deposit, especially in large quantities; a warehouse, and also a place where goods are kept for sale in large or small quantities. Until the legislature undertakes the work of classification of stores generally, we must hold the general term used in the code to embrace every species of store not otherwise particularly named and taxed." *Pitts v. Vicksburg*, 72 Miss., 181.

Again, the defendant is not exempt from the revenue tax because she kept goods for sale at a profit, to be sold only to the laborers on her plantation, and only kept on hand such goods as were necessary for her tenants. *Alcorn v. State*, 71 Miss., 464. In this case the court uses this language in explanation of the revenue law: "The privilege tax imposed by our law in cases of this character, is not upon mercantile firms or upon individuals engaged in the selling of merchandise, but upon stores."

The law reaches and subjects to the payment of a privilege tax, any person, whether lawyer, merchant, farmer, doctor, mechanic or what not, who keeps on deposit goods for sale at a profit. The only difference made by the law is in the amount of the tax imposed, according to the value of the stock on hand at any time, ranging from \$300 to \$50,000 or more. If we are right in our position that defendant was subject to pay a privilege tax, she clearly had no legal status in court, in demanding a recovery of the account of \$67.50 against the defendant.

C. H. Brown, for appellee.

The business engaged in by the appellee in supplying her tenants has not a single attribute of a store, nor does it, in a

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single phase, merit the adjudication in the cases of *Folkes v. State*, 63 Miss., 81; *Alcorn v. State*, 71 Miss., 464; *Pitts v. Vicksburg*, 72 Miss., 181. The court, in the case of *Folkes v. State*, *supra*, says: "The purpose of the statute is to impose a tax on every place where goods are deposited and sold by a dealer engaged in buying and selling goods, and not (as virtually contended for by appellant), to impose a tax on every landlord who supplies his tenants. Such a construction would, in effect, annul the law as now in force relative to landlord and tenant," and, I will add, disconcert the supply system, and contravene public policy.

Granting that appellee was conducting the business of a store without paying the tax as provided for, yet, the appellant must fail in this action, for two reasons, to wit: (1) The proof does not show, as disclosed by the record, that the appellee's "stock of goods" were of any value; (2) the appellee is not seeking through the courts an enforcement of a contract, but stands in the attitude of one who has collected his debt, and the debtor is suing to recover back what he has freely and voluntarily paid.

STOCKDALE, J., delivered the opinion of the court.

Appellant sued in a magistrate's court to recover his share of the crop made by him on appellee's plantation during the year 1896, valued by him at \$100. Appellee filed, as offset, an account for supplies furnished appellant during the year 1896, amounting to \$67.70. Judgment being rendered for appellant, appellee appealed to the circuit court, and having given bond for the forthcoming of four bales of cotton and two tons of cotton seed claimed by appellant, she retained the same in her possession. It was conceded that appellant made the four bales of cotton and two tons of seed, and admitted by the parties on the trial in the circuit court that Mrs. A. H. Pattison had furnished the supplies charged in the account filed as offset to plaintiff's demand, and that she had not paid any privilege tax nor taken out any privilege license to do business or keep a store during the year 1896, or any part thereof. Plain-

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tiff objected to any testimony being introduced to support the account (except a small portion thereof charging articles raised at home by defendant), contending that defendant could not recover for the articles charged therein because they were sold and furnished from her store when she had no privilege license on said store or to keep the same. Plaintiff testified that he made four bales of cotton, weighing five hundred pounds each, worth five cents per pound, and two tons of cotton seed worth six dollars per ton, and he was entitled to half thereof, and that the corn had been divided.

The testimony shows that defendant (appellee) kept for sale, and sold at a profit at credit prices, groceries, dry goods and clothing, in considerable quantities and variety, at her residence on her plantation, but sold only to her tenants, as other planters did; that she purchased quantities of goods at Memphis, Tenn., and other places, and sold at retail for profit at credit prices. Appellee's counsel contends (1) that these goods were kept partly in a room in the dwelling and partly in a smokehouse, and was not a store; (2) that appellee furnished only her own tenants; (3) that no proof of any value of said goods was made. The word store is used to designate a place where goods are sold, and it is not necessary that they be kept in a house to constitute a store. *Folkes v. State*, 63 Miss., 81.

The fact that appellee sold only to her own tenants does not argue that her business was not a store. She only sold to a selected class of customers, as she had a right to do. *Alcorn v. State*, 71 Miss., 464. "A store" is employed in § 3390, code of 1892, to designate a place where goods are kept for sale by wholesale or retail. "There is no reference to any particular class of goods named. The store may be for the sale of dry goods, clothing, groceries, drugs, or any other article of merchandise kept for sale." *Pitts v. Vicksburg*, 72 Miss., 181. And the statute of 1896 adopts the same language on page 46, as § 3390 of the code. It seems clear that appellee's business constituted "a store." It is in testimony that the articles con-

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stituting appellee's account against appellant were furnished him from appellee's store, and were valued at \$67.70, and the store out of which they came must have been of some value. And if said store was worth no more than \$300, the owner must pay \$2.50 privilege tax.

The contention of appellee's counsel that she does not stand in the attitude of one seeking the enforcement of a contract, but in the attitude of one who has collected a debt, voluntarily paid, and the debtor seeking to recover it back, is not supported by the record in this case.

Defendant (appellee) did not answer plaintiff's demand, that the matter had been settled and the account paid, but propounded her accounts as a set-off to plaintiff's demand, and asked judgment upon it, and obtained judgment for the amount of the account, with six per centum interest thereon, and, singularly enough, got a judgment in her favor that she retain the cotton and cotton seed bonded by her, and which it was conceded plaintiff had made.

Appellee's effort to distinguish this case from the Alcorn case, because there it was shown that there was a large number of tenants and here it was not so shown, is without force; seeing that appellant offered to prove the same state of facts in this case, his testimony was rejected by the court erroneously, as we think, upon objection by appellee's counsel.

It is evident from the record in this case that defendant below, appellee here, carried on her business in disregard of the statute in reference to privilege licenses, and she cannot base any claim upon her contract for the sale of goods to appellant, except as to such articles as she had produced on her own plantation. Laws 1896, sec. 2, p. 50.

In the attitude of this case, as shown by the record, a new trial ought to have been granted. The assignments of error, are well taken, and are sustained.

The judgment of the court below is reversed, a new trial awarded, and the cause remanded.

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WIRT ADAMS, STATE REVENUE AGENT, v. EVANS & Co.

STATE REVENUE AGENT. *Costs.* Code 1892, §§ 4194, 4199.

Where judgment is obtained by the state revenue agent for money and costs, and a sum is realized on execution insufficient to satisfy the whole, the officers of the court may retain their costs out of the collection; and code 1892, §§ 4194, 4199, does not authorize the state revenue agent to demand the entire collection, leaving the costs unpaid.

FROM the circuit court of Claiborne county.

HON. W. K. McLAURIN, Judge.

The facts are stated in the opinion.

E. S. & J. T. Drake, for appellant.

This case turns on the construction of §§ 4194 and 4199 of the code of 1892. The whole question resolves itself into this: Which is the precedent claim to the fund realized? The state, county, and municipality, or the officers of the court? Where an officer collects taxes by distress, the tax must first be paid out of the fund realized, before the costs incurred in collecting. This case is essentially the same, and, by a parity of reasoning, the revenue agent, who stands in the place of the state, county, and municipality, shall first be paid.

No counsel for the appellee.

STOCKDALE, J., delivered the opinion of the court.

Wirt Adams, state revenue agent, recovered judgment in the circuit court of Claiborne county against Evans & Co. for \$1,500, at the January term, 1895, of said court. And the sheriff made return on the *venditioni exponas* that he had sold all the attached property on June 22 and 23, 1896, for \$154.85, and applied

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\$116.75 to payment of costs, and paid \$38.10, balance, to plaintiff's attorneys.

On January 12, 1897, plaintiff filed the following motion in said cause: "And now comes the plaintiff herein, and showing to the court that he is the state revenue agent, and by law in no case liable for costs in suits for revenue, and, showing further to the court, that, in above case, by virtue of an execution, issued June 11, 1896, and a sale of personalty thereunder, on June 22 and 23, 1896, the sheriff realized the sum of \$154.85, of which sum the said sheriff applied \$116.75 to payment of costs in said cause and costs of execution, and moves the court for an order that the sheriff of Claiborne county, R. C. McCay, pay over to said plaintiff said sum of \$116.75, the amount so retained by him for costs."

Counsel on both sides in the court below agreed that the facts are as stated in the motion. The court overruled and denied said motion, and the plaintiff, the state revenue agent, appealed from that judgment.

We are cited to §§ 4194 and 4199, code 1892, as authority sustaining the motion. Section 4194 provides that the state revenue agent "shall not be liable for costs, and may appeal without bond." Section 4199: "Neither the state nor any county, municipality, or levee board shall be chargeable with any fees or expenses on account of any investigation or suit made or instituted by the state revenue agent."

The question raised for adjudication by this motion is, to what extent these two statutes interfere with and repeal the general rule of law that officers of the courts must have their costs to compensate their services. The plaintiff is primarily liable for costs in civil cases, but may recover back his costs from the defendant if he be successful in the suit. But if he lose the suit, judgment goes against him for costs; or if he fail to recover costs from defendant on his judgment for costs, he is still liable for the costs of suit. By § 4194 the revenue agent is exempted from all liability for costs. He is not pri-

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marily liable for costs as plaintiff. He is not liable for costs if he loses the case, as other plaintiffs are. The court could not tax him with costs upon dismissal of a state case, or on dismissal for want of jurisdiction, nor can a chancellor apportion costs on him. And we think it is manifest that when § 4194 saves him from all these liabilities, so as not to deter him from pressing the claims of the state, it has served the purpose the legislature intended it for.

In this case the judgment is that plaintiff recover the full amount of his judgment (\$1,500) and \$86.75 costs, over and above his judgment, and the execution commands the sheriff to make that amount (\$1,500) for plaintiff's debt, and \$86.75 for costs in that behalf expended, and had there been property enough of defendant's found, the sheriff would have made that amount. Plaintiff, in this case, would have no right to the costs; it was not his money. Other plaintiffs recover costs to reimburse themselves, because they must pay the officers, and the costs are their money and they have the right to have it, but the state revenue agent is not liable for costs, and does not have to pay the officers, and his recovery of costs is a recovery for the officers, and he has no right to have possession of it or handle it. In this case the plaintiff had the right to demand and receive \$1,500, and no more. He had no right to receive or demand \$86.75 in addition, except as he is used by the court, as plaintiff, to recover costs for the officers.

The remaining question is, whether the plaintiff is entitled to have his judgment satisfied before the judgment for costs is satisfied. The statute does not say that the court has not the power to expand a special statute in derogation of the general statute. We think the legislature meant by this special statute just what it said, and no more—to exempt the revenue agent from personal liability for costs. We do not believe that the lawmaking power intended, by the plain, brief enactment exempting the revenue agent from liability for costs, to say that the general statute providing for officers' costs should be abro-

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gated as to him, and the officers of the courts should be compelled to work for nothing in all the suits he might bring until his judgment should be fully satisfied, notwithstanding judgment was rendered for costs and could be made out of defendant.

In attachment cases, levying upon and keeping property might be very expensive. Levying upon and taking into possession a stock of goods (as in this case had it been a large one), and selling the same, might be expensive, and the construction of the statute contended for by appellants would not only require the sheriff to render his services without remuneration, but to pay out money of his own and never get it back. It cannot be supposed that the lawmaking power intended, in addition to the extraordinary privileges and powers unquestionably conferred upon the revenue agent, to impose such hardships and injustice upon county officers. Manifestly, the scope of the statute is to exempt the revenue agent from liability for costs where other plaintiffs or complainants would be liable, and not more. The revenue agent is accredited by the state as its agent, and clothed with great powers. He may demand access to and examine and investigate the books, papers and vouchers of all fiscal officers, and buy and hold lands for the state, etc., and institute suit when he desires to do so.

But § 4199, code 1892, provides that no expense shall come upon the state by reason of his actions. The revenue agent shall receive no salary; nor shall he make any charges against the state, or against any county, municipality, or levee board, for any investigations made by him, or suits instituted by him, or any fees or expenses incurred by him, and that is the full scope of § 4199.

The sheriff was commanded (in the case at bar) to make the debt and costs out of the defendant, but made a less amount, and pursued the usual course, and paid the judgment for costs first. That does not make the revenue agent liable for costs; nor does it impose any charge on the state, nor any county,

Brief for appellant.

municipality or levee board, and neither § 4194 nor § 4199 has been in any way violated or disobeyed.

The judgment of the court below is affirmed.

A. J. JAMISON ET AL. v. J. N. DULANEY ET AL.

INJUNCTION. *Attorneys' fees on dissolution.*

Where a suit in equity is alone for injunction, and its issuance is preliminarily obtained, and it is afterwards dissolved, the complainant being cast in the suit, the defendant is entitled to recover attorneys' fees necessarily incurred in defending the whole case.

FROM the chancery court of Chickasaw county, first district.
HON. BAXTER MCFARLAND, Chancellor.

The town of Houston issued \$4,000 in bonds for municipal purposes. The appellants enjoined the collection of a small amount of taxes levied on their property to pay these bonds. Their bill for injunction was demurred to and the demurrer sustained, injunction dissolved and \$40 attorneys' fees awarded against complainants. From this interlocutory decree the complainants prosecuted an appeal. The complainants, after disposition of the appeal, filed an amended bill, to which the defendants answered, and, on motion to dissolve the injunction, on pleading and proof, the injunction was dissolved. An appeal was prosecuted from this decree of the court below and it was affirmed. When the mandate, after the second appeal, reached the court below, defendants moved the court to dismiss the suit and award them \$400 damages for attorneys' fees. From the decree on the motion sustaining the same, this appeal is prosecuted.

W. G. Orr, for appellant.

The interlocutory decree dissolving the injunction and awarding \$40 attorneys' fees is *res adjudicata*. The grant of attorneys' fees appealed from is excessive. The taxes actually en-

74	890
789	631

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joined by complainants do not exceed the amount awarded. The decree appealed from is void, because notice of the motion on which it was made was not given the complainants. It is true the litigation settled the validity of the whole issue of the bonds in one sense, but all the taxes were not enjoined.

T. J. Buchanan, Jr., and Wm. S. Bates, for appellees.

The decree is not objectionable because the court allowed damages to appellees on hearing its first motion to vacate the temporary injunction, for, by that act the court did not lose jurisdiction. The question of allowance here, like that of taxing costs against parties as the suit progresses, is within the discretion of the court, and may be exercised by it in the award of damages to appellee. Any other theory would withdraw from the chancery court the power vested in it to grant full and adequate relief in this matter to appellees, on the final determination of appellant's injunction suit.

Where the dissolution is the only relief asked, a reasonable attorney's fee is allowed. Beach on Injunction, sec. 203, p. 212; 81 Mo., p. 81; 103 Mo., p. 284. The appellees would be entitled to fees in resisting the attempt to have the injunction made perpetual, and in resisting efforts to reverse the decree of the lower court.

Argued orally by *T. J. Buchanan, Jr.*, for appellees.

WHITFIELD, J., delivered the opinion of the court.

This is the third appearance of this case in this court. The original bill entitled the complainant to no other relief than injunction, and the validity of the whole issue of bonds was determinable by its result, and the chancellor dissolved the injunction, allowing some \$40 as attorney's fees. This court, on appeal, affirmed that decree. When the cause was remanded, the complainants asked leave to file an amended bill, substantially identical with the original bill. This was refused, and,

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on appeal, we affirmed that decree. When the case was the second time remanded, the counsel for appellees, who had rendered services at all stages of the cause in the chancery court and in this court, were allowed \$400, less the previous allowance, and this appeal brings into review the propriety of this action of the learned chancellor.

As stated, the only relief prayed was the injunction, and the validity or invalidity of the whole issue of bonds was put, by the bill, directly in issue. As said in *Hammerslough v. Kansas City*, 79 Mo., p. 87: "It is true the services were assessed as covering the whole case, but a trial of the motion to dissolve must have brought up all the material issues of the case and rendered it necessary to dispose of the whole case on the motion." The best announcement of the rule we have seen is in *Thomas v. McDonald*, 77 Iowa, 302, where the court says: "The sole question before us, is whether the services rendered in answering the petition and defending on the trial were services in defending against the injunction. This depends upon whether the case was an independent proceeding for injunction alone, or whether the injunction was a mere auxiliary to a proceeding for other relief. The relief asked was that the sale be enjoined [just as in the case at bar], and for such other and further relief as the petitioner is entitled to. The allegations of the petition did not entitle the petitioner to any other relief than injunction. Strike the prayer for injunction, and the allegations upon which it is asked, from the petition, and there is no case left. True, the relief asked in this case depends upon the question of title, but that does not change the fact that it is an independent proceeding for injunction only. Being for injunction only, there is nothing else in the case to defend against. . . . The case was one for injunction alone, and what was done in the way of defense was against the injunction, and resulted in its dissolution. We hold that, under the facts certified, the plaintiff was entitled to recover his expenses for attorneys' fees necessarily incurred in defending the case in equity."

 Brief for appellants.

The rule is expressly so declared in 2 High on Inj., sec. 1686; 1 Beach on Inj., sec. 203, note 4, end; and in *Bolling v. Tuit*, 65 Ala., 428.

Affirmed.

J. H. AUST ET AL. v. C. ROSENBAUM.

1. CHANCERY PRACTICE. *Supplemental bills. Demurrer.*

Upon demurrer to bill in equity, the original bill and supplemental bills, if any be filed, should be treated as one pleading.

2. MORTGAGE. *Bill to redeem. Tender.*

If the object of a bill in equity be to redeem, and not to cancel a mortgage, a previous tender of the sum due is unnecessary, where complainant is unable to know, because of defendant's fault, what sum is due upon the mortgage debt. *Mortgage Co. v. Jefferson*, 69 Miss., 464, distinguished.

FROM the chancery court of Noxubee county.

HON. T. B. GRAHAM, Chancellor.

Bill in equity by J. H. Aust *et al.* against C. Rosenbaum, seeking to redeem mortgaged premises. From the decree of the court below denying redemption, complainants appealed. Pending the suit in the court below an effort was made by Rosenbaum to sell the land in controversy under the mortgage, which was in form a deed of trust, and the complainants obtained, on a supplemental bill, an injunction against the sale; but before its actual service the land was sold, and Rosenbaum was declared the purchaser. The facts in reference to this sale were brought before the court, and a decree was made adjudging it void. Rosenbaum prosecuted a cross appeal, and sought to vacate the decree adjudging his purchase invalid. The other facts are stated in the opinion.

J. E. Rives, for appellants.

This was a bill to redeem. The bill was filed after the debt

74	893
78	928
74	893
78	904

Brief for appellees.

became due, and was not in its nature a bill to enjoin, but simply one to redeem. The bill fully complied with the requisites of a bill for redemption. "A mortgagor can always come into a court of equity and obtain a decree removing the lien of the mortgagee." Pomeroy on Eq. Juris., sec. 1219. What are the essential requisites for maintaining the suit? "The essential requisites for maintaining the suit are that the mortgage debt should be due, and that the mortgagor should offer to pay whatever amount is due, and should pay the same when ascertained and fixed by the decree." *Ib.* Now, in this case there was an offer on the part of complainants to pay whatever amount the court should find to be due; and we ask, further, that the entire tract of land, or so much thereof as may be necessary, be sold to satisfy and pay defendant every dollar that might be found due. But this is not all; the bill was also one for an accounting. What is an offer to do equity? Mr. Pomeroy lays it down as a rule that a complainant is required "to acknowledge, admit, provide for, secure or allow whatever equitable rights the defendant may have." Sec. 388. At no place does the author say that under this rule the complainant should in every case make an actual tender of the full amount due. He recognizes the fact that in some cases the position of the parties, the circumstances and all, would compel a court to say that in order to do equity a tender—an actual tender—would be necessary, while under other circumstances an offer to pay defendant out of the proceeds of the mortgaged property would be a sufficient offer or compliance with the rule.

T. W. Brame, for appellees.

There was no offer to do equity on the part of Aust. He did not tender, nor offer to tender, to C. Rosenbaum any amount. It was Aust's duty to offer to pay at least what he thought was due. This he does not do, and his bill and supplemental bill should be dismissed. *Duncan v. Moore*, 67 Miss., 136.

On cross appeal the burden is on Aust, to show that the sale

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was made in disregard of the fiat of injunction, and that defendants had notice of the writ of injunction before the sale, which notice should be authoritative. The testimony shows clearly that the defendants were not served with notice until after the sale was made.

WOODS, C. J., delivered the opinion of the court.

The original bill, and the first and second supplemental bills, should have been regarded and treated together as one pleading in the court below. Both supplemental bills set up matters transpiring subsequently to the filing of the original bill, and matters, too, arising because of the wrongdoing of the respondents in their disregard for and contempt of the authority of the chancery court. Considered, then, as one complaint, and not as three, as was done below, we find a bill exhibited in a threefold aspect, viz.: a bill for a discovery and an accounting, for relief from usurious interest and for a redemption. The bill, moreover, charged frauds by specific averments, in plain terms, and required an answer, though none was filed with the demurrer to the original and first supplemental bills, nor, in fact, ever filed. Besides the many other charges of the bill, it avers that C. and H. Rosenbaum entered into a combination or scheme whereby they were to secure the mastery over the complainants and their home and plantation, and by a long-continued series of illegal and fraudulent acts be, at length, enabled to overpower complainants and wrest their property from them and convert it to their (respondent's) own use and profit. The bill alleges that, as part of this scheme, H. Rosenbaum was to be made the supply merchant of the complainants, sell them goods at unusual and extortionate prices, charge usurious interest on balances, keep complainants in ignorance of the state of the accounts with him by withholding and refusing to make up and furnish complainants with statements and itemized accounts of their dealings, and, at the end, falsely pretend that C. Rosenbaum had become the owner of the accounts thus

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made by complainants with H. Rosenbaum, whereby they (the respondents) were enabled to incorporate into the note given for the \$600 actually loaned at the start by C. Rosenbaum, the store account indebtedness of complainants to H. Rosenbaum, and have complainants secure payment of that, with grossly usurious interest, in the same trust deed upon the home and plantation of complainants which inexorable necessity had constrained them to give to secure payment of the \$600 loan.

The bill avers that, taking advantage of J. H. Aust's ignorance of business affairs, and of his sickness, and of his reliance upon the good faith of respondents, and of his reliance upon their agreement and promise to correct any errors which might thereafter appear in the store accounts, the store accounts, to the sum of several hundred dollars, were incorporated in the renewal note for the loaned money, and their payment secured by the trust deed which secured payment of that loan. The bill then avers that, despite repeated requests for itemized accounts of their accounts with the store of H. Rosenbaum, they have persistently been refused and denied, and that complainants, by reason of such misconduct on the part of H. Rosenbaum, in refusing to make up and furnish complainants with copies of their accounts, itemized, are unable to say what they really and truly owe upon such accounts, but they aver that, independently of usurious interest, they owe a greatly smaller sum than that whose payment respondents are demanding, and that the difference between the sum really and honestly due and that which respondents claim to be due, grows out of extortionate charges for goods, false charges for goods never purchased by complainants, and failure to give complainants proper credits for payments made; and so they pray a discovery and an accounting first, and then for redemption when they have been enabled to see what their indebtedness really is, after purging the whole debt of its glaring usury.

The bill admits the indebtedness, after being purged of usury, and after false charges for goods never bought have been elim-

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inated, and after credits for payments made have been entered, and expresses not only a willingness to pay the debt really due, but prays the court to decree, if necessary, a sale of all the lands embraced in the trust deed (which appear to be worth greatly more than enough to meet and pay any debt that may be found to be due upon an accounting), to satisfy the respondent's just demands. No tender of the money due is made by the complainants.

There was a general demurrer filed to the original and first supplemental bills, because of the failure of complainants to do equity, in that they did not tender with their bill the amount due from them to respondents. This demurrer was sustained, and the original and the first supplemental bills were dismissed.

The question presented by the appeal from this decree of the court below is, was an actual tender of the amount due, with lawful interest, essential to the maintenance of this bill, on the very peculiar facts disclosed in and by all the bills—the original, and the first and second supplemental—it having already been said that they should have been regarded and treated as one pleading?

It is to be observed that this is not an equitable proceeding for the cancellation of a mortgage, nor for relief against one cent that may be found to be legally due. The case of *Mortgage Company v. Jefferson*, 69 Miss., 770, upon which the court below rested its rulings, as we have reason to believe, does not answer our question, is distinguishable from this case at a glance, and is not authority for the decree below. In *Jefferson's* case, cancellation of a contract claimed to be usurious and void, was sought in our courts by *Jefferson*, but as he confessedly had the money of the mortgage company in his pocket, our holding was that he must do equity before we would cancel the deed—that is, that he must tender the money which he admitted he had from his adversary, with lawful interest, and then we would decree cancellation of the usurious and void contract. But that is not the present case. The complainants do not ask cancella-

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tion of the trust deed which their adversary holds; they do not deny their indebtedness, nor pray to be relieved against it. On the contrary, the complainants admit that they are justly indebted to respondents, but they are unable to say in what sum they are indebted, by reason of respondents' refusal to furnish them with their accounts, and they do not make tender because they cannot make tender of an uncertain sum. In a word, they do not make tender because their adversary's wrongdoing had made it impossible for them to do so. By the averments of the pleading it is plain that the uncertainty as to the amount due grows out of the deliberate fault of respondents. But it is suggested in brief of counsel for respondents that the complainants might and should have tendered \$600, with lawful interest, and such sum on the store accounts as they knew and admitted to be due. The answer to this is twofold: (1) The tender of only a part of what may be found to be due would be no tender. It is a tender of the full amount, principal and interest, which is required, and which the respondent may accept and walk out the court with, without litigation, delay and costs. (2) No tender could have been made of any sum due on the store accounts. These had never been furnished to complainants, and it was impossible for them to know what amount was due, and equally impossible for them to tender an unknown sum.

We recur, then, to the consideration of the correctness of the action of the court below, in holding a tender essential with a bill to redeem.

It has been held by high authority that no tender is necessary in a case for redemption. *Quin v. Brittain & Jones*, Hoff. Ch. Rep., 353; *Beach v. Cooke*, 14 N. Y., 508. In the recent case of *Cassely v. Witherbee et al.*, 119 N. Y., 522, this view is broadly sustained. Said the court: "As a condition to his right to maintain this action, it was not necessary for the plaintiff, before commencement thereof, to tender or offer to pay the balance due upon the mortgages. Nor was it necessary for him in his complaint to offer to pay the amount which should be found due. There are,

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undoubtedly, authorities laying down the rule in general terms, that before an action to redeem from a mortgage can be maintained, the mortgagor must either tender the amount due upon the mortgage, or offer to pay the amount in his complaint. But it has never been so decided in this court, and we think it is now the settled law of this state, under our present system of pleadings, that the allegation of such tender or offer is unnecessary. It is certainly not necessary to allege that a tender or offer to pay the amount due upon the mortgage was made before the commencement of the action; and an offer in the complaint is, at most, a technical matter, serving no substantial purpose, because, in the judgment given in such an action, the court always holds that redemption can be had upon payment of the amount due. The tender and offer are important only as they have bearing upon the question of costs. The mortgagor's right of redemption is not dependent upon his offer or tender of payment. It exists independently thereof and antecedently thereto. . . . Payment upon redemption, and as a condition of redemption, can be enforced in the action, and the dismissal of the complaint in such action, on default of payment under the judgment, as a condition of redemption, operates as a foreclosure." It must be admitted, however, that the current of authority is against this view. Conceding, then, for our present purposes only, that the general rule is that a tender is necessary for the successful maintenance of a bill to redeem, it does not follow that the general rule is rigid and inflexible and without its exceptions. There must be exceptions to the rule, unless justice is to be sacrificed, now and then, to technical rules, and rules of pleading at that. How can one tender where redemption is sought by an infant who has nothing with which to redeem except the mortgaged estate, and when it appears that the mortgaged estate is largely in excess, in value, of the debt secured, and that a sale of only a part of such estate will suffice to pay the creditor's demands? This presents an exceptional case to the rule, and this very case has been recognized as an exception,

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thereby demonstrating that the rule is not inflexibly rigid. See *Johns v. Smith*, 56 Miss., 727. So, too, in cases where an accounting is shown to be necessary to ascertain the amount due, and especially where the amount is not known to the party seeking redemption, and cannot be ascertained by him because of the fault of his adversary in refusing to furnish information which it was his duty to furnish, an exceptional case is presented whose peculiar facts take it out of the general rule. For shall any man be required by any rule to perform an impossible act? And this last is the case in hand. The decree of the court below, in sustaining the demurrer to the original and first supplemental bills, was erroneous. They, with the second supplemental bill, should have been treated as a whole, and the demurrer should have been overruled. It follows, of course, that the action of the court below in excluding all the evidence directed to the main issues made by the bill and its supplementary parts, though consistent with the court's former action in sustaining the demurrer, was erroneous, as that former action itself was erroneous. The respondents should have been required to answer the charges of the bill, and to have made discovery as to the true state of the accounts of H. Rosenbaum with complainants, and, if then necessary, an accounting should have been decreed, and for whatever amount thus found to be due there should have been a decree for a sale of the lands to satisfy this amount. Of course, if the complainants had failed to sustain their bill by proper evidence, and the whole amount demanded by respondents had appeared to be due, the bill and supplementary bills should have been dismissed, and such decree would, in effect, have been a decree for foreclosure of the mortgage. We deem it unnecessary to go further, as the foregoing views will be sufficient guide for the court in the further progress of the cause. The decree dissolving the injunction and awarding damages and costs were likewise erroneous.

Reversed and remanded on direct appeal, with leave to respondents to answer within thirty days after mandate filed, and with leave to both parties to take further evidence, if desired. The decree on cross appeal is affirmed.

IN MEMORIAM.

WILLIAM LEWIS NUGENT.

PROCEEDINGS IN THE SUPREME COURT.

MONDAY, JANUARY 18, 1897.

THE Chief Justice, the Hon. Thomas H. Woods, announced the death of Col. W. L. Nugent, which had occurred just before the opening of court, and it was thereupon ordered that in respect to his memory court be adjourned till the following morning at 10 o'clock.

MONDAY, FEBRUARY 8, 1897.

Hon. J. A. P. Campbell, with appropriate remarks, presented the following preamble and resolutions, adopted at a meeting of the bar of the supreme court:

Death has invaded our ranks and broken our circle of professional brethren by removing from our midst our esteemed brother, William L. Nugent, whose demise we greatly deplore. He possessed a good intellect, good habits, good acquirements, great industry, perseverance, and devotion to duty, with laudable ambition for success in his profession, and these brought their sure reward, and placed him in the front rank of the eminent lawyers of Mississippi, while his affable and unostentatious manner and bearing, his cordial and generous nature, with many other virtues, made him deservedly a favorite with all classes.

In his death the bar has lost one of its most eminent and distinguished members, and Mississippi one of her prominent and valuable citizens. He had, besides excellent mental powers, a

cool judgment, great equipoise, wonderful quickness of apprehension, a cheerful and genial spirit, a warm heart, and benevolent disposition, prompting to acts of kindness to others, a fine person and voice, and persuasive eloquence, and was thus well fitted to shine, as he did, in the varied walks of life. He was a good lawyer, a good citizen, a good husband and father and friend, and, as we believe, a sincere Christian; was true to his country, and did his duty to it in peace and war; was true to his clients, ever alert, expert, and diligent, and in every relation of life was faithful and true. What more can or need be said of him? May his survivors emulate his many virtues!

Resolved, That this tribute of the bar to their departed brother be presented to the supreme court of Mississippi, in which he was long a distinguished practitioner, with a request that it be spread on the minutes of the court as an enduring memorial of the deceased, and that a copy be presented to his widow.

Hon. Charles E. Hooker then paid a tribute to the deceased as a citizen, lawyer, and churchman, and spoke most touchingly of his home life and his devotion to Christianity.

Hon. S. S. Calhoun then said:

Another of our brothers has come within the sweep of the scythe whose swathe must soon or late be marked by the prostrate forms of us all. In surveying the line of march of the great reaper, we are driven daily to renewed contemplation of the insolvable mystery of the wonderful facts—the amazing phenomena—of life and death. Unaided human reason again and again turns from these vast themes humiliated by its powerlessness, and yet is again and again drawn back by the very marvel of their incomprehensibility.

This seems a design of the deity, and the purpose seems to be to compel halts in the march of affairs to examine character, to determine qualities for emulation, to consider duties to the living, to reflect upon our own defects and our own final ac-

countability for our own acts of commission and omission while within the domain of time.

The death of any of us, however obscure, is a fact of the most serious import to our own family circle and friends, but the death of a great lawyer is a monumental public event. The social conglomerate seems to see in it a blow at the body politic, to recognize that the whole structure is weakened. This is because of the fact that lawyers, more than any other class, unless possibly ministers of the gospel, are most influential in conserving, elevating or quickening the moral sentiments of mankind.

Look back over thirty-five years and see how brightly shines out the memory of William Yerger, Fulton Anderson, George L. Potter, H. H. Chalmers, Wiley P. Harris, David Shelton, and others. In this galaxy now stands the name of William Lewis Nugent, the latest victim of death, that common enemy of mankind, or its universal friend, I know not which.

To this assemblage it is needless to comment on his professional attainments. We all know that his death closed a life of intense and unremitting attention to business, a life of great labor and of devotion to a profession he loved and of marked success in its practice. He ranked easily in the highest grade of thorough lawyers. We all knew his amazing fertility of resource, his readiness in adapting varying tactics to the shifting phases of his case, his profound learning, his lucid and strong presentation. His ambition was confined within the boundaries of his chosen vocation. He had no craving for, and made no effort to achieve, distinction beyond the limits of his profession, and looked with indifference on the honors of official preferment.

As a man and citizen, I am gratified to refer to his leading characteristics. If generosity in thought and deed, if boundless benevolence, keen and tender sensibilities for the sufferings and afflictions of his fellowmen, the absence of envy, and a hand, heart, and purse ever opened to the poor and the distressed ones, are, as I believe they are, the greatest virtues of our race, then

I say William L. Nugent had no superior within my acquaintance in the daily exercise of these the greatest virtues.

While a very resolute man, one who never yielded an inch to fear, it seemed impossible for him to say "No," when his humanity was appealed to. No compromise on demand of him, a generous compromise on appeal to him.

He gave beyond his means, and seemed never to take his ability into consideration when called on to relieve distress. One of his most admirable traits was his moderation in the use of power. He was a magnanimous conqueror, and was wholly free from that petty meanness we occasionally see in even good lawyers of nagging an opponent. He took no pleasure in harassing an antagonist, but was ever generous and considerate pending the controversy and after the victory. Not to protract these remarks, it is enough to say we have lost a great lawyer and a good man, and that his chief attributes should be inculcated in young lawyers and practiced by all lawyers.

The court directed the resolutions to be spread on the minutes, and through Justice Whitfield responded to the resolutions of the bar as follows:

The court joins with the bar in paying fitting tribute to the exalted character as a lawyer, citizen, and man, of our lamented brother, Col. W. L. Nugent. The contemporary of the greatest lawyers of our past, he filled a conspicuous place in the history of this court, among the richest treasures of whose jurisprudence are the contributions of his genius, and whose reports contain a permanent memorial of the imperishable splendor of his intellect. Religiously eschewing public office and political preferment, his fame rests upon the securer basis of great personal achievement. He was profoundly versed in all the learning of his profession, and held all its vast stores in ready command for apt and instant application to the ever shifting phases of varied cases. Thoroughly informed with the spirit of all law, he was no prisoner bound in the fetters of rules the reason for whose existence had long since passed away, but stood forth

a matchless champion of the evolution of the law, of its ceaseless and triumphant struggle away from the crudities, absurdities, and injustices of its obscure dawn, towards the elevated plane of its present day, whereon all men meet as equals; and the marvelous faculties of his rich, virile mind hence displayed their finest action in the field of reason, principle, and independent thought. Perfectly at home in all departments of the law, he proved himself, in all its jurisdictions, a dreaded adversary of incomparable skill and resourcefulness in attack or defense. Of all lawyers whom I have ever known Col. Nugent was preëminently the fittest model of the proper conduct and bearing of the attorney towards the court. Equal to either fortune, he moved serene in victory or defeat with a self-control the consummate product of perfect discipline. He was the prince of courtesy; not that artificial gloss of manner—the veneer of insincerity—assumed for a purpose, but the radiance of a genuine soul shining out upon all.

His charming urbanity was part of his mental and moral constitution, inseparable from him as fragrance from the flower. It was as if the genius of courtesy had spilled the cup of grace over him, and he could not but be gracious.

As a citizen, the country, his state, and the city of his home had none worthier. He loved his country in the sense those words had in the olden day. He was proud of his state; an optimist as to her destiny, seeing “nothing about her, in prospect, less glorious than that which encircled her past.” And there was no great public enterprise, having in view the betterment of this city, which failed of his vigorous support.

Our friend was a man of boundless benevolence. No child of poverty ever called on him in vain; no deserving charity ever lacked his generous aid. Above all, he was a devoted Christian. Whilst he towered in the church of his love, her surest and strongest support, loving her services and rejoicing in her glorious advance, his sympathies embraced in their broad sweep all of every sect or name who struggled for the uplifting of the race. *Ego sum homo, et nihil humani a me alienum puto*, was the maxim of his life.

In contemplating the death of our brother—so sudden and profound a shock to us—I have seen in it, for him, only the completeness of a well-ordered departure. He sunk not through slow decay into the grave, with powers dimmed, faculties visibly failing, the object of pitying regard; but as some splendid monarch of the forest, towering towards the sun, is struck suddenly to earth, with all his greenery glorious about him, so he, in the plenitude of his power, in the glory of constant achievement, passed from struggle into triumph, from care into peace. It is for us to follow on, and meanwhile, amid his great contemporaries in the galaxy of the past, to place the portrait of William Lewis Nugent, as fit companion for the mightiest shades of departed greatness.

As a mark of further respect to the memory of Colonel Nugent, it was ordered that court stand adjourned till the following morning at ten o'clock.

INDEX.

ACCOUNTING.

1. *Guardian and ward. Accounting. Bond.*

A guardian and his sureties are accountable not only for money collected by him, but also for money which he might and could have collected by proper diligence. *Ames v. Williams*, 404.

2. *Same. Delivery of assets to successor. Estoppel.*

When a guardian neglects to collect a solvent note due him as such, and delivers the same to his successor, his wards, in contesting his account, are not estopped from charging him and his sureties as if he had actually collected the money due on the note, with interest, by the fact that they had reduced the note to judgment against the maker, even where the guardian is himself the maker of the note, credit being given, however, for what was realized by the suit. *Ib.*

3. *Chancery court. Guardian's sale of land. Rights of purchaser. Notice.*

One who claims under a guardian's sale, that was neither reported to nor confirmed by the court, nor made in compliance with the decree ordering it, is affected with notice of the infirmity in his title, and cannot claim the land as a *bona fide* purchaser for value, there being no evidence of payment of the purchase money save a somewhat vague recital in the guardian's void conveyance of a payment of one-half thereof at the time of sale. *Hicks v. Blakeman*, 459.

4. *Same. Improvements.*

One who, claiming under a guardian's sale that is void for want of confirmation and noncompliance with the decree ordering it, enters upon the land under the guardian's deed, and, in the honest belief that his title is good, makes permanent improvements thereon, is entitled to a decree for such improvements on the establishment of an adverse title. *Cole v. Johnson*, 53 Miss., 94, cited. *Ib.*

5. *Same. Measure of recovery.*

The amount that the market value of the land is enhanced by the improvements made thereon, in good faith, by one claiming under the void conveyance of a guardian, is the proper measure of his recovery on account thereof. *Nixon v. Porter*, 38 Miss., 401; *Wille v. Brooks*, 45 *Ib.*, 542; *Clark v. Hornthall*, 47 *Ib.*, 434; *Massey v. Womble*, 69 *Ib.*, 347, cited. *Ib.*

ACKNOWLEDGMENT.

Husband and wife. Conveyances between. Notice. Code 1892, § 2294.

Under § 2294, code 1892, providing that conveyances between husband and wife shall be invalid as against third persons, unless acknowledged and recorded, an unacknowledged deed from a husband to his wife is invalid as against the attaching creditors of the husband, although recorded, and such creditors, prior to attaching, had actual notice of the conveyance and of its contents as they appeared of record. Citing *Montgomery v. Scott*, 61 Miss., 409. *Snider v. Udell Woodenware Co.*, 353.

ACTION OR SUIT.

1. *Common carrier. Damage to freight. Shipper. Owners. Justice's jurisdiction.*

Where a person ships freight, part of which belongs to him and parts to others, and the same is damaged by the negligence of the carrier, he may sue in tort in a justice's court for the injury to his own property, if the same does not exceed two hundred dollars, and that, too, though the entire shipment was made under one contract with him alone, and the damages to all the property exceed said sum; and, in such case, the fact that the plaintiff has brought separate suits, as agent for the other owners for their damages, will not defeat his individual case. *Waters v. Railroad Co.*, 534.

2. *Tort. Contract. Walver. Parties.*

The owner of property damaged by a common carrier is a proper plaintiff in an action sounding in tort for the injury, even where the shipment was by and in the name of another. The contract may be waived and suit brought in tort for the gross or wilful negligence. *Ib.*

3. *Premature institution. Statutory penalty. Railroads. Farm-crossing. Code 1892, § 3561.*

An action for a second enforcement of a statutory penalty, on the ground of a continuance of the wrong, is premature when brought on the day of the disallowance, by the supreme court, of a suggestion of error to its judgment in a prior suit establishing plaintiff's right to the penalty, no reasonable time to repair the wrong being afforded the defendant. *Railway Co. v. Odeneal*, 827.

ADMINISTRATOR.

See ESTATE OF DECEDENT.

ADMISSIONS.

Evidence. Written contract.

When a party, by admissions, has qualified his right, one who holds under him succeeds only to the right thus qualified, and the admissions are, ordinarily, competent evidence; but evidence of such admissions are incompetent where they contradict the terms of a written contract between the parties. *Johnson v. Johnson*, 549.

ADVERSE POSSESSION.

See LIMITATION.

AFFIDAVIT.

Criminal law. Larceny. Ownership of property. Insufficiency of affidavit. Motion in arrest of judgment.

An affidavit charging the larceny of cotton from affiant's premises, shown to be a farm, is insufficient, if it contains no averment that the cotton was the property of another than the accused; and the defect, being one of substance, may be availed of in arrest of judgment. *Hughes v. State*, 368.

AGENT.

See PRINCIPAL AND AGENT.

APPEAL.

TO SUPREME COURT.

1. *Reversal. Jurisdiction. Dismissal of cause on appeal.*

On the reversal of a final decree in a cause of which the chancery court had no jurisdiction, the appellate court, instead of remanding the cause to the court having jurisdiction thereof, will dismiss the same when it appears from the evidence that the complainant has no cause of action. *Griffin v. Byrd*, 32.

2. *Decree discharging receiver. Appeal therefrom. Code 1892, § 575.*

An appeal lies from a decree discharging a receiver appointed without notice on the *ex parte* application of the complainant, since the latter, on the revocation of the appointment, is liable on his bond, given under § 575, code 1892, for all damages sustained by reason of the appointment. *Hanon v. Well*, 69 Miss., 476, distinguished. *Pearson v. Kendrick*, 235.

3. *Appeal from award. Procedure. Code 1892, ch. 6.*

On an appeal from an award returned into and approved by the circuit court under § 112, code 1892, the award is dealt with by the supreme court, in the matter of procedure, as having the same effect as a final judgment of the trial court, and, when set aside, the submission falls with it. *Rand, Johnson & Co. v. Peel*, 305.

4. *Error. Sale of property as subject to waste. Code 1892, § 516.*

That the sheriff, in the progress of the cause, wrongfully sold property, without an order of court, as liable to waste or decay, under § 516, code 1892, is not cause for reversing the final decree in the case. *Day v. Hartman*, 489.

5. *Attachment for rent. Amount in controversy. Code 1892, § 85.*

Upon an appeal to the supreme court from a judgment of the circuit court, in favor of a landlord, in an action of replevin by the tenant for property distrained for rent, begun in a justice's court, the amount in controversy is determined by the rent due, as adjudged by the circuit court, and not by the value of the property seized. *Biddle v. Pulne*, 494.

TO CIRCUIT COURT.

6. *Justice of peace. Transfer of cause. Another justice.*

If an affidavit is made before a mayor, charging defendant with a misdemeanor, and the mayor transfers the affidavit and the prisoner to a justice of the peace, who tries the defendant and convicts him, without objection to the latter's jurisdiction, the defendant cannot, upon appeal to the circuit court from such conviction, dismiss the prosecution because of irregularity in the transfer, or the want of an order on the mayor's docket making it. *Holley v. State*, 878.

ARBITRATION AND AWARD.

1. *Irregularities of arbitrators. Code 1892, ch. 6.*

An award returned into the circuit court by arbitrators appointed under § 112, code 1892, should be vacated when it appears that after the submission of the case the arbitrators heard the unsworn testimony of one party, in the absence of and without the knowledge of the other or his counsel. *Rand, Johnson & Co. v. Peel*, 305.

2. *Same. Appeal from award. Procedure. Code 1892, ch. 6.*

On an appeal from an award returned into and approved by the circuit court under § 112, code 1892, the award is dealt with by the supreme court, in the matter of procedure, as having the same effect as a final judgment of the trial court, and, when set aside, the submission falls with it. *Ib.*

ARGUMENT.

Improper remarks of counsel. Exceptions. Practice.

If improper remarks are made by counsel, it is the duty of the court to interpose, but if the court fail to do so, it is the duty of opposing counsel to call attention to the impropriety. If opposing counsel fail, the wrong will not be corrected in the supreme court except in extreme cases of abuse of the advocate's privilege. *Pullman Car Co. v. Lawrence*, 782.

ASSESSMENT FOR TAXES.

1. *Taxation. Misdescription. Parol evidence. Collateral attack.*

In the absence of fraud, a misdescription in a perfected and approved assessment cannot, in a collateral attack, be shown by parol. *Bank v. Adams*, 179.

2. *Same. Incomplete, etc. Direct attack.*

Misdescription may be so shown if the assessment be incomplete and is undergoing direct adjudication. *Ib.*

3. *Same. Lists rendered by taxpayers. List made by assessor.*

The assessment is the list made by the assessor, and it is not constituted of the lists rendered him by the taxpayers. *Ib.*

4. *Same. Judgments on appeals from assessments. Damages. Code 1892, § 4360.*

A judgment determining the liability of property to taxation and fixing its value, is not, on appeal to the supreme court, within § 4360, code 1892, imposing damages. *Ib.*

ASSESSOR.

Fees of. Laws 1894, p. 28.

The additional compensation, not exceeding ten cents for each individual assessed on the personal roll, may or may not be allowed, within the discretion of the board of supervisors. *Williams v. Shurkey County*, 122.

ASSIGNMENT.

1. *Decree on publication. Rchearing. Right of defendant's assignee. Code 1892, §§ 519, 520.*

The right given by §§ 519, 520, code 1892, to nonresident defendants against whom a final decree has been rendered on proof of publication only, to apply for a new hearing of the cause within two years thereafter, is assignable. *Fink v. Henderson*, 8.

2. *Same. Defendant's grantee.*

A conveyance of land vests in the grantee by way of assignment all the rights of action and defense that his grantor had in respect thereto. *Ib.*

3. *Deed of trust. Bona fide holder.*

If the holder of a deed of trust indorses the same, and the note secured by it, and permits the possession of the instruments to pass, and the indorsee transfers the same for value to an innocent third party, the latter will acquire title thereto superior to any undisclosed equity in the original indorser. *Gross v. Oatts*, 357.

ASSIGNMENT FOR CREDITORS.

1. *Jurisdiction of chancery court. Assignee as receiver. Code 1892, §§ 117, 118, 119.*

Under §§ 117, 118, 119, code 1892, which provide that, within twenty-four hours after taking possession, the assignee, in every general assignment for the benefit of creditors where the value of the assigned property exceeds \$1,000, shall file his petition and bond in the chancery court, and, on the approval of the bond, shall be a receiver of the court, no jurisdiction over said property is acquired by said court until such petition is filed and bond approved, and, until then, creditors may attach the same in the hands of the assignee. *Welmer v. Scales*, 1.

2. *Same. Assignment filed for record.*

The filing of a general assignment for creditors for record in the office of the clerk of the chancery court is not such a compliance by the assignee with §§ 117, 118, 119, code 1892, as will vest that court with jurisdiction over the assigned property. *Ib.*

3. *Same. Rights of attaching creditors.*

When the assignee in a general assignment has filed his petition, together with a duly approved bond, under §§ 117 and 118, code 1892, the jurisdiction of the chancery court attaches to the assigned property, and that court will draw to it the determination of all controversies in which liens thereon are asserted, including attachments levied thereon. *Ib.*

4. *Corporations. Insolvency. Directors preferred.*

While it has been decided in this state that an insolvent corporation may, in good faith, prefer creditors, yet the directors of such a corporation cannot, by their own votes and acts, prefer themselves. *Whitfield, J.*, concurred in result, but favored overruling the cases which hold that insolvent corporation can make preferential assignments. *Love Mfg. Co. v. Queen City Mfg. Co.*, 290.

5. *Judgment creditors. Costs and fees. Receiver. Code 1892, ch. 8.*

An assignee and receiver, under code 1892, ch. 8, where the assignment is made after the rendition and enrollment of a judgment against the assignor, is not, as against the judgment creditor, entitled to withhold commissions, costs, and fees, incurred in resisting such creditor's demand, out of the proceeds of the assigned property. *Pittman v. Hopkins*, 563.

6. *General assignment. Deed of trust. Several instruments. Intent.*

Whether a deed of trust to secure a creditor shall be treated as part of a general assignment, made shortly afterwards by the debtor, is to be determined by the intent and purpose of the grantor in executing the former; time, in such case, being of evidential value only. *Pollock v. Sykes*, 700.

7. *Same.*

Where a merchant, determined to execute a deed of trust to secure certain creditors, consulted a lawyer for the purpose of so doing, and, being advised by the lawyer that it would necessitate an assignment, nevertheless executed the deed of trust, and shortly afterwards, on same day, made a general assignment, the two deeds are not to be construed as parts of the same transaction, and the deed of trust is not void. *Ib.*

8. *Same. Tendency of authorities.*

The tendency of recent well-considered authorities, is to recognize the view that preferences were allowed at common law, and that the principles of an insolvent or bankrupt law are not applicable to the making of general assignments. *Ib.*

9. *Same. Code 1892, ch. 8.*

In case of a general assignment, administered under code 1892, ch. 8, in which the trustee and beneficiaries in a deed of trust are made parties to the suit—the assignment covering the equity of redemption in the property conveyed by the deed of trust—the distinct natures of the trusts are not affected by the fact that the parties to the deed of trust united with the assignee and receiver in a petition to have the receivership extended over the entire property. *Ib.*

10. *Same. Personal decrees.*

In case of a general assignment, administered under code 1892, ch. 8, creditors who file cross petitions, and establish their debts, are entitled to personal decree against the assignor, even if they fail in the attacks upon the validity of the assignment. *Ib.*

11. *Assignment for creditors. Receiver. Sale. Code 1892, ch. 8.*

In the case of a general assignment, administered under code 1892, ch. 8, where previous attachments have been levied upon the property, a sale made by the assignee-receiver should be of the property freed from the lien of the attachments, and the proceeds should be applied by the court to the payment of the attaching creditors if they prove prior right, they being parties to the chancery suit. *Weems v. Love Mfg. Co.*, 831.

12. *Same. Assignee-receiver. Dual relation.*

Under code 1892, chapter 8, the assignee in a general assignment, who has given bond, etc., occupies a dual relation. *Perry-Mason Shoe Co. v. Sykes*, 72 Miss., 390, approved. *Ib.*

13. *Same. Fraud. Penalty.*

The only penalty inflicted by the law upon one who executes, or procures the execution to him, of a fraudulent assignment, is the loss of the benefits of the instrument. *Ib.*

ATTACHMENT.

1. *Jurisdiction. Judgment in personam.*

A judgment for the debt in attachment should be set aside for want of jurisdiction when there has been no levy upon property or garnishment in the county where the action was brought, although an alias writ of attachment has been served upon the defendant, as a summons, in another county, where he resides. *Campbell v. Triplett*, 365.

2. *Same. Venue.*

The venue of actions *in personam* is "in the county in which the defendants, or any of them, may be found." *Ib.*

3. *Rent. Claimant. Notice. Code 1880, § 1318; code 1892, § 2533.*

A claimant of goods attached for rent is to be treated, on the interposition of his claim, as a plaintiff in replevin, and should give due attention to the prosecution of his suit, without notification thereunto. *Pierce v. Watkins*, 394.

4. *Same. Case.*

When his claim of goods attached for rent has been determined adversely to a claimant by a justice of the peace who was without jurisdiction, and, in consequence of his successful appeal to the circuit court, the papers are sent back and transferred for trial to a justice having jurisdiction, he is not entitled to be notified of the transfer. *Ib.*

5. *Attachment levy. Indemnifying bond. Damages.*

Attorneys' fees, and other expenses incurred in sustaining a claimant's issue for property seized under attachment, are not ordinarily recoverable in a suit on an indemnifying bond. *Moore v. Lowrey*, 413.

6. *Same. Wilful wrong.*

Knowledge by a plaintiff in attachment, and of his attorney, that a bill of sale to personal property has been executed by the defendant in execution and duly recorded, does not make a levy thereon a wilful wrong. *Id.*

7. *Assignment for creditors. Receiver. Sale. Code 1892, ch. 8.*

In the case of a general assignment, administered under code 1892, ch. 8, where previous attachments have been levied upon the property, a sale made by the assignee-receiver should be of the property freed from the lien of the attachments, and the proceeds should be applied by the court to the payment of the attaching creditors if they prove prior right, they being parties to the chancery suit. *Weems v. Love Mfg Co.*, 831.

ATTORNEY AND CLIENT.

1. *Attorney and client. Statute of limitations.*

An attorney at law is liable for any breach of duty under his contract of employment; and, such liability attaching immediately upon the breach, the statute of limitations ordinarily begins to run from the breach. *Hudson v. Kimbrough*, 341.

2. *Same. Trust.*

While the relationship of attorney and client, where the employment extends only to the collection of a single claim, is, in a limited sense, one of trust, yet it is not such an express and continuing trust as will take the client's cause of action out of the operation of the statute of limitations. *Id.*

3. *Same. Concealed fraud. Code 1880, § 2679.*

The client's action against his attorney for breach of contract of employment, must, in case of fraudulent concealment of the cause of action, be begun, as provided by § 2679, code 1880, within the prescribed period after the discovery of the cause of action, or from the time when reasonable diligence would have led to its discovery. *Id.*

4. *Fees.*

The relation of attorney and client is created by contract, and litigants who have in no way assumed liability for attorney's fees

cannot be held therefor, because they derived benefit, directly or incidentally, from the professional services rendered. *Rives v. Patty*, 381.

5. *Attorney's services. Fund realized.*

An attorney employed by some of the creditors of an insolvent estate, who realizes by his services a fund for distribution among all the creditors, cannot have the fund charged with his fees, but must look alone to those who employed him for compensation. *Ib.*

ATTORNEY'S FEES.

See INJUNCTION.

BANKS.

1. *Privilege tax. Laws 1888, pp. 15, 16.*

Under the act of 1888 (Laws pp. 15, 16), the payment of a proper privilege tax exempted a bank from *ad valorem* taxes. *Bank v. Adams*, 179.

2. *National bank. Receiver. Stockholder.*

The receiver of a national bank can recover of a stockholder therein on a note given to the bank for capital stock. *Hepburn v. Kincannon*, 691.

BILL OF EXCEPTIONS.

1. *General and special.*

Bills of exceptions are of two kinds; general bills, which are taken to the action of the court on a motion for a new trial, and by which the whole case, or so much thereof as is desired, can be brought into review; and special bills, by which one or more specific rulings of the trial court are presented for review. *State v. Spengler*, 129.

2. *General bills. Formal exceptions. Code 1892, § 739.*

The formality of excepting to the action of the trial court in passing upon a motion for a new trial is dispensed with by statute. Code 1892, § 739. *Ib.*

3. *Same. Authentication. When signature and certificate of judge unnecessary.*

Under the act of 1896 (Laws, p. 91), in cases where the evidence and proceedings are noted by an official stenographer, if the stenographer's notes be written out, and the parties, or their attorneys, agree, in writing, that the same is correct, such notes so written become part of the record without the approval or signature of the judge. *Ib.*, 129.

4. *Stenographer's notes. Agreement of attorneys. Laws 1896, pp. 91-93.*

Under the act of 1896 (Laws 1896, pp. 91-93) it is unnecessary that the agreement between attorneys, that the stenographer's notes of the evidence, as written out and filed, is correct, so as to dispense with the judge's signature to the bill of exceptions, shall be indorsed upon the paper so filed; it is sufficient if the agreement is made in writing and filed, even in the supreme court. *Sanders v. State*, 531.

5. *Same. Limit of time.*

The act of 1896, *supra*, does not fix any limit on the time within which such agreement shall be made, and it therefore can be made at any time before the appeal is barred. *Ib.*

BILL OF REVIEW.

Guardian and ward. Final settlement. Surcharging account.

In case a guardian makes a final settlement in the court with the ward, who has become adult, and the ward appears and files an answer, admitting the correctness of the account, and acknowledges receipt of the balance shown to be due, and the court approves the settlement and decrees the payment to have been made, and the ward afterwards files a bill denying the payment and seeking to surcharge the account, and the material facts thereof are denied by the answer to the bill, a decree dismissing the bill and refusing to open the account is correct, if the evidence establishes the truth of the answer. *Gillelyen v. McKinney*, 764.

BILLS AND NOTES.

1. *Criminal law. Larceny. Promissory note. Value of same. Code 1892, § 1176.*

Under § 1176, code 1892, providing that "if any person shall steal any . . . note . . . the money due thereon, . . . shall be deemed the value of the article stolen, without further proof," it is not error upon the trial of one charged with the larceny of a promissory note, to exclude evidence offered to show that the paper was uncollectible by reason of the insolvency of the makers and their refusal to pay, and therefore worthless, or at least under the value of twenty-five dollars. *McDowell v. State*, 373.

2. *Payment. Agreement to accept less sum than debt in satisfaction.*

The acceptance from the maker by the payee of a note, of a sum less than the amount due, with an agreement that it is received as full satisfaction, accompanied by the surrender of the note, extinguishes the entire debt. *Jones v. Perkins*, 29 Miss., 139; *Pulliam v. Taylor*, 50 Miss., 251, in so far as they announce the contrary, and *Burrus v. Gordon*, 57 Miss., 93, overruled. *Clayton v. Clark*, 499.

3. *National bank. Receiver. Stockholder.*

The receiver of a national bank can recover of a stockholder therein on a note given to the bank for capital stock. *Hepburn v. Kincannon*, 691.

4. *Promissory note. Code 1892, § 3503.*

A plea that the note sued upon was executed upon the payee's promise to credit the amount upon another note for a larger sum previously executed, and which the payee represented he still held, but which he had, in fact, transferred, and that the larger note had been paid, presents a defense, under code 1892, § 3503. *Robertshaw v. Britton & Koontz*, 873.

BLIND PERSON.

Common carriers. Passengers.

A common carrier of passengers cannot refuse to carry a person otherwise qualified, upon the sole ground that he is blind. *Zachery v. Railroad Co.*, 520.

BOARD OF SUPERVISORS.

Acts of predecessors.

A board of supervisors is not bound by the acts of its predecessors, unless such acts were within the scope of their authority. *Jefferson County v. Grafton*, 435.

BUILDING AND LOAN ASSOCIATION.

Withdrawal of member. Settlement. Usury.

Where a borrowing member of a building and loan association withdraws from and makes a settlement with it, and is credited, as his share of the profits, with the unearned part of the premium bid by him and with a sum as dividend on his stock, including interest charged him and his fellow members, he cannot recover from the association, as usurious, interest charged on premiums; and he is bound by a settlement made by him which was voluntary and in which nothing was concealed from him. *Building & Loan Association v. Leonard*, 810.

BURDEN OF PROOF.

See EVIDENCE.

CARRIERS.

See RAILROADS AND SLEEPING CARS.

CARRYING CONCEALED WEAPON.

1. *Bodily harm. Code 1892, § 1027.*

Apprehension of bodily harm is not a defense, under code 1892, § 1027, to a charge of carrying concealed weapons. It is the apprehension of a serious attack which the statute make a defense, and this is the equivalent of "great bodily harm." *Strother v. State*, 447.

2. *Same. Apprehension.*

The statute never designed to authorize men to carry concealed deadly weapons on a mere apprehension of some bodily harm; the apprehension must be of serious, or great, bodily harm. *Ib.*

3. *Same. Actual apprehension.*

In order to make out a defense, the accused must not only have reason to do so, but must actually apprehend a serious attack from an enemy. *Ib.*

4. *Same. Burden of proof. Reasonable doubt. Code 1892, § 1027.*

While the statute places the burden of proof of such defense upon the accused, yet so long as there is a reasonable doubt of guilt, or a probability of his innocence, the state has not satisfactorily made out its case. *Ib.*

CERTIORARI.

See JUSTICE OF THE PEACE.

CHANCERY COURT.

1. *Assignment for creditors. Jurisdiction of chancery court. Assignee as receiver. Code 1892, §§ 117, 118, 119.*

Under §§ 117, 118, 119, code 1892, which provide that, within twenty-four hours after taking possession, the assignee, in every general assignment for the benefit of creditors where the value of the assigned property exceeds \$1,000, shall file his petition and bond in the chancery court, and, on the approval of the bond, shall be a receiver of the court, no jurisdiction over said property is acquired by said court until such petition is filed and bond approved, and, until then, creditors may attach the same in the hands of the assignee. *Welmer v. Scales*, 1.

2. *Same. Assignment filed for record.*

The filing of a general assignment for creditors for record in the office of the clerk of the chancery court is not such a compliance by the assignee with §§ 117, 118, 119, code 1892, as will vest that court with jurisdiction over the assigned property. *Ib.*

3. *Same. Rights of attaching creditors.*

When the assignee in a general assignment has filed his petition, together with a duly approved bond, under §§ 117 and 118, code 1892, the jurisdiction of the chancery court attaches to the assigned property, and that court will draw to it the determination of all controversies in which liens thereon are asserted, including attachments levied thereon. *Ib.*

4. *Assignment. Decree on publication. Rehearing. Right of defendant's assignee. Code 1892, §§ 519, 520.*

The right given by §§ 519, 520, code 1892, to nonresident defendants against whom a final decree has been rendered on proof of publication only, to apply for a new hearing of the cause within two years thereafter, is assignable. *Fink v. Henderson*, 8.

5. *Same. Defendant's grantee.*

A conveyance of land vests in the grantee by way of assignment all the rights of action and defense that his grantor had in respect thereto. *Ib.*

6. *Practice. Filing of papers.*

Although marked filed, a paper is not filed, in the legal sense, until it has been delivered to the proper officer with the purpose that the usual steps shall be taken in reference thereto. *Bank v. Hoyt Bros. & Co.*, 221.

7. *Same. Creditor's bill. Case.*

When the solicitor of the complainant in a creditor's bill hands the same, together with the exhibits contained under the same cover, to the clerk of the chancery court and causes him to mark the bill filed, and, after making a corresponding entry on his general docket, to inclose the same in a regular court wrapper, and thereupon tells the clerk, without giving any reason therefor, that he did not wish process to be immediately issued and desired to take the papers back to his office, and, in fact, then carried the papers away with him, the clerk charging him with them and refraining from issuing process, there has been no such filing of the bill, in legal contemplation, as will entitle the complainant to priority of lien, under § 503, code 1892, over another attacking creditor who, in the interval of several days preceding the return of the papers and issuance of process, has, after learning the above facts, filed a like bill and had process issued thereon. *Ib.*

8. *Receiver. Appointment. Notice. Code 1892, §§ 574, 922.*

When a receiver has been appointed, without notice to the adverse party, by a chancellor other than the one in whose district the cause is pending, it will be presumed, on a recital to that effect in

the chancellor's order, that the showing necessary to authorize such action under §§ 574, 922, code 1892, was made by the complainant. *Pearson v. Kendrick*, 235.

9. *Same. Decree discharging receiver. Appeal therefrom. Code 1892, § 575.*

An appeal lies from a decree discharging a receiver appointed without notice on the *ex parte* application of the complainant, since the latter, on the revocation of the appointment, is liable on his bond, given under § 575, code 1892, for all damages sustained by reason of the appointment. *Hanon v. Well*, 69 Miss., 476, distinguished. *Ib.*

10. *Deed of trust. Rights of beneficiary. Precarious security. Case.*

The beneficiary in a deed of trust upon property subject to prior liens, that affords but a precarious security for his debt, and is all that the debtor owns, is entitled to have a receiver appointed of the rents and profits to the same extent as if his incumbrance were a mortgage; and it is error to discharge a receiver, on defendant's motion, before final hearing, when the evidence adduced shows such a state of case. *McDonald v. Vinson*, 56 Miss., 497, cited. *Ib.*

11. *Guardian's sale of land. Rights of purchaser. Notice.*

One who claims under a guardian's sale, that was neither reported to nor confirmed by the court, nor made in compliance with the decree ordering it, is affected with notice of the infirmity in his title, and cannot claim the land as a *bona fide* purchaser for value, there being no evidence of payment of the purchase money save a somewhat vague recital in the guardian's void conveyance of a payment of one-half thereof at the time of sale. *Hicks v. Blakeman*, 459.

12. *Same. Improvements.*

One who, claiming under a guardian's sale that is void for want of confirmation and noncompliance with the decree ordering it, enters upon the land under the guardian's deed, and, in the honest belief that his title is good, makes permanent improvements thereon, is entitled to a decree for such improvements on the establishment of an adverse title. *Cole v. Johnson*, 53 Miss., 94, cited. *Ib.*

13. *Same. Measure of recovery.*

The amount that the market value of the land is enhanced by the improvements made thereon, in good faith, by one claiming under the void conveyance of a guardian, is the proper measure of his recovery on account thereof. *Nixon v. Porter*, 38 Miss., 401; *Wille v. Brooks*, 48 *Ib.*, 542; *Clark v. Hornthull*, 47 *Ib.*, 434; *Massey v. Womble*, 69 *Ib.*, 347, cited. *Ib.*

14. *Jurisdiction. Nonresidents. Unliquidated demand.*

The chancery court has jurisdiction of a bill for relief filed against a nonresident of the state, having property here, to redress a wrong, even if the damages suffered by complainant are unliquidated. *Gordon v. Warfield*, 553.

15. *Same. Abandonment of trust. Equity jurisdiction.*

If a trustee in a deed of trust abandons the trust, a court of equity may enforce the trust at the suit of the beneficiary. *Carey v. Fulmer*, 729.

16. *Same. Effort to sell for more than was due. Injunction.*

If an effort be made under a deed of trust to sell the property for largely more than the sum due, an injunction may properly be issued. *Ib.*

17. *Chancery practice. Amendment.*

In a suit to enjoin a sale under a deed of trust, on the ground that nothing was due when the deed was executed and that it was obtained by fraud, where defendants filed a cross bill to enforce the deed, it is error not to allow complainants to amend the bill so as to show that the debt claimed by the holder of the deed was made up of usury and other improper charges. *Ib.*

18. *Guardian and ward. Final settlement. Surcharging account.*

In case a guardian makes a final settlement in the court with the ward, who has become adult, and the ward appears and files an answer, admitting the correctness of the account, and acknowledges receipt of the balance shown to be due, and the court approves the settlement and decrees the payment to have been made, and the ward afterwards files a bill denying the payment and seeking to surcharge the account, and the material facts thereof are denied by the answer to the bill, a decree dismissing the bill and refusing to open the account is correct, if the evidence establishes the truth of the answer. *Gillellen v. McKinney*, 764.

CHANCERY PLEADING.

See PLEADING.

CHANCERY PRACTICE.

See PRACTICE.

CHARACTER.

Evidence. Character.

Evidence of the good character of the accused should be left to the jury without any instruction from the court as to its value. *Powers v. State*, 777.

CHASTITY.

See SEDUCTION AND WITNESS.

CIRCUIT COURT.

1. *Certiorari. Justice of the peace. Practice. Code 1892, § 89.*

Under § 89, code 1892, upon certiorari from the judgment of a justice of the peace, the circuit court, finding error in the record, should award a trial *de novo*, unless it be apparent of record what final judgment, as an entirety, the justice's court should have rendered. *Evans v. Railway Co.*, 230.

2. *Same. Value of property not appearing.*

In such case, the justice's record showing a judgment for the plaintiff by default in an action of trespass to property, and not showing the value of the property, upon reversal, a trial *de novo* should have been awarded. *Ib.*

3. *Same. Process. Amendment of return.*

In such case, the return of the officer upon a summons may be amended in the circuit court after reversal of the justice's judgment. *Ib.*

4. *Jurisdiction. Ejectment. Constitution 1890, § 160.*

The circuit court has jurisdiction generally of an action of ejectment, and is not deprived thereof by § 160 of the constitution of 1890. *Railroad Co. v. LeBlanc*, 650.

5. *Same. Constitution 1890, § 147.*

The circuit court having entertained jurisdiction of this case—an action of ejectment—wherein plaintiff's title was proved by a tax deed and a decree of the chancery court confirming the same, this court is precluded, by § 147 of the constitution 1890, from reversing for want of jurisdiction, even if, by § 160 of the constitution, the remedy in the particular case should have been sought in the chancery court. *Ib.*

CODE, HUTCHINSON'S MISSISSIPPI.

Hutchinson's Mississippi Code not a revision. Statutes of a general nature not repealed thereby. *Taylor v. Chickasaw County*, 23.

CODE 1871.

- § 1382. County warrants. Judgments. Nul tiel record. *Taylor v. Chickasaw County*, 23.

CODE 1880.

1. § 491. Tax title. Ambiguous description. Pleading. *Mixon v. Clevenger*, 67.
2. § 521. Tax sale. Mode of offering land. Subdivisions. *Gregory v. Brogan*, 694.
3. § 526. Tax collector's deed. *Prima facie* validity of sale. *Mixon v. Clevenger*, 67.
4. § 990. Wagering contracts. Judgment. *Campbell v. Bank*, 526.
5. § 1141. Usury. Conflict of laws. Penalty. *Bank v. Auze*, 609.
6. § 1318. Attachment. Rent. Claimant. Notice. *Pierce v. Watkins*, 394.
7. § 2160. County warrants. Effect as judgments. Limitation. *Taylor v. Chickasaw County*, 23.
8. § 2211. Justice of the peace. Judgment. Sale of lands. *Dunlap v. Fant*, 197.
9. § 2678. Limitations. Absence from state. *Wells v. Levy*, 34.

CODE 1892.

1. § 85. Appeal. Attachment for rent. Amount in controversy. Jurisdiction. *Biddle v. Paine*, 494.
2. § 89. *Certiorari*. Justice of the peace. Practice. *Evans v. Railway Co.*, 230.
3. § 112. Arbitration and award. Irregularities of arbitrators. *Rand, Johnson & Co. v. Peel*, 305.
4. §§ 117, 118, 119. Assignment for creditors. Assignee as receiver. *Welmer v. Scales*, 1.
5. §§ 117-124. Assignment for creditors. Several instruments. Personal decrees. *Pollock v. Sykes*, 700.
6. §§ 117-124. Assignment for creditors. Receiver. Sale. *Weems v. Love Mfg. Co.*, 831.
7. §§ 117-124. Assignment for creditors. Receiver. Costs and fees. *Pittman v. Hopkins*, 563.
8. § 304. Board of supervisors. Authority to sell land. *Jefferson County v. Grafton*, 435.
9. § 322. County warrants. Limitation upon effect as judgments. *Taylor v. Chickasaw County*, 23.
10. § 340. Did not repeal act of 1884 in relation to public roads in Madison county. *Madison County v. Stewart*, 160.

11. § 516. Sale of property to prevent waste. Error therein. Appeal. *Day v. Hartman*, 489.
12. §§ 519, 520. Assignment. Decree on publication. Rehearing. *Fink v. Henderson*, 8.
13. §§ 574, 922. Chancery court. Receiver. Appointment. Notice. *Pearson v. Kendrick*, 235.
14. § 575. Decree discharging receiver. Appeal therefrom. *Pearson v. Kendrick*, 235.
15. § 650. Venue of actions; in what county. *Campbell v. Triplett*, 365.
16. § 714. Interpleader. Suit for price of timber. Title to land. *Boyle v. Mantion*, 572.
17. § 739. Motion for new trial. Exception to order overruling, unnecessary. *State v. Spengler*, 129.
18. § 849. Foreign corporations. Jurisdiction. *Pullman Palace Car Co. v. Lawrence*, 782.
19. § 922. Chancery court. Receiver. Appointment in vacation. Notice. *Pearson v. Kendrick*, 235.
20. § 1027. Criminal law. Concealed weapons. Bodily harm. *Strother v. State*, 447.
21. § 1176. Criminal law. Larceny. Value of promissory note. *McDowell v. State*, 373.
22. § 1255. Criminal law. Indictment. Poisoning. Malice. *Taylor v. State*, 544.
23. § 1298. Seduction. Chastity. *Carroll v. State*, 688.
24. § 1341. Criminal law. Indictment. Motion in arrest. *Taylor v. State*, 544.
25. § 1582. Dram-shop keeper. Suit on bond. Reasonable doubt. *State v. Spengler*, 129.
26. § 1740. Deed. Death of grantor. Delivery proved by grantee. *Horne v. Nugent*, 102.
27. § 1752. Depositions. Notice. *Gordon v. Warfield*, 553.
28. § 1784. Evidence. Land commissioner. Copies from book of entries. *Boddie v. Pardee*, 13.
29. § 1808. Railroads. Live stock on track. Stock law district. *Roberts v. Railroad Co.*, 334.
30. § 1877. Res adjudicata. Decree. Construction. Widow's allowance. *Blackbourn v. Senatobia Educational Asso.*, 852.
31. § 1987 to § 2026, inclusive. Witness fees. Commitment. Per diem. *Marshall County v. Tidmore*, 317.
32. § 2021. Tax collector. Damages. *Miller v. Land Co.*, 110.
33. § 2114. Wagering contracts. Judgment. *Campbell v. Bank*, 526.
34. § 2162. Extradition. *Ex parte Devine*, 715.
35. § 2294. Husband and wife. Conveyances between. Acknowledgment. Notice. *Snider v. Udell Woodenware Co.*, 353.
36. § 2349. Usury. Conflict of laws. Penalty. *Bank v. Auze*, 609.
37. § 2355. Juror. Examination. Competency. *Jeffries v. State*, 675.
38. § 2358. Jury laws. Fourteenth amendment constitution United States. *Dixon v. State*, 271.

39. § 2375. Grand jury. Objections to members. *Dixon v. State*, 271.
40. § 2394. Justice of the peace. Jurisdiction. Amount in controversy. *Waters v. Railroad Co.*, 534.
41. § 2434. Statute of frauds. Parol sale of standing timber. *Walton v. Lowrey*, 485.
42. § 2479. Deed. Life estate. Convey and warrant. *Hart v. Gardner*, 153.
43. § 2495. Landlord's lien. Co-extensive with those of employer and employee under § 2682. *Powell v. Smith*, 142.
44. § 2533. Attachment. Rent. Claimant. Notice. *Pierce v. Watkins*, 394.
45. § 2682. Employees' lien. Agricultural products. Purchaser. Notice. *Powell v. Smith*, 142.
46. § 2732. Mortgages. Equity of redemption. Limitation. *Tuteur v. Brown*, 774.
47. § 2741. Usury. Penalty. Statute of limitations. *Bank v. Auze*, 609.
48. § 2748. Limitations. Absence from the state. *Welle v. Levy*, 34.
49. §§ 2783, 2786. Suit affecting real estate. *Lis pendens*. Constructive notice prior to present statute. *Trust Co. v. Hardwood Co.*, 584.
50. § 3390. Privilege tax. Goods in dwelling and smokehouse. *Craig v. Pattison*, 881.
51. § 3482. Indemnifying bond. Attachment. Wilful wrong. *Moore v. Lowrey*, 413.
52. § 3499. Judgment of justice of the peace. Sale thereunder. Filing transcript. *Dunlap v. Fant*, 197.
53. § 3503. Promissory note. Pleading. *Robertshaw v. Britton & Kwontz*, 873.
54. § 3559. Railroads. Engineer. Incompetent fireman and defective appliance. Constitution 1890, § 193. Laws 1896, p. 97. *Railroad Co. v. Guess*, 170.
55. § 3561. Railroads. Farm crossing. Necessary plantation road. *Alabama & Vicksburg Railway Co. v. Ligon*, 176.
56. § 3561. Action. Premature institution. § Railroads. Farm-crossing. Penalty. *Railway Co. v. Odeneal*, 827.
57. § 3726. Replevin. Judgment in alternative. *Bond v. Griffin*, 599.
58. § 3776. Tax deed. Confirmation. Ambiguity. *Railroad Co. v. LeBlanc*, 650.
59. § 3811. Tax collector. Advertisement of land. *Miller v. Land Co.*, 110.
60. § 3813. Tax titles. Sale in subdivisions. *Nelson v. Abernathy*, 164.
61. § 3817. Tax titles. Curative statute. Ineffectual as to void sales. *Nelson v. Abernathy*, 164.
62. § 3929. Did not repeal act of 1884 in relation to public roads in Madison County. *Madison County v. Stewart*, 160.
63. §§ 4194, 4199. State revenue agent. Costs. *Adams v. Evans & Co.*, 886.

64. § 4234. Trial of right of property. Business sign. *Albin v. Howard*, 370.
65. § 4284. Railroad commission. Findings not conclusive. *Telegraph Co. v. Railroad Commission*, 80.
66. §§ 4328, 4329. Telegraph companies. Discontinuance of office. *Telegraph Co. v. Railroad Commission*, 80.
67. § 4360. Taxation. Assessments. Judgments on appeal. Damages. *Bank v. Adams*, 179.
68. § 4461. Purchaser of land at execution sale. Unlawful detainer against tenant of defendant. *Glenn v. Caldwell*, 49.

CONFESSION.

1. *Court and jury.*

The court determines the competency of a confession, and, when admitted, the jury cannot rightfully fail to consider it as evidence, though, if they disbelieve the witnesses who testify to the confession, they may attach no weight to the same. *Hunter v. State*, 515.

2. *Same. Free and voluntary. Reasonable doubt.*

The court should not admit a confession if it entertains a reasonable doubt as to whether it was free and voluntary. *Ib.*

CONFIRMATION.

See SALE. PRACTICE, CHANCERY COURT.

CONFLICT OF LAWS.

1. *Contracts. Lex loci contractus. Lex solutionis.*

The law for the construction and enforcement of contracts made in one state to be performed in another, is accurately and clearly stated in the case of *Brown Brothers v. Freeland & Murdock*, 34 Miss., 181, and the syllabus to that case is commended. *Bank v. Auze*, 609.

2. *Same. Appropriation of payments.*

Before such a suit can be maintained, the borrower must extinguish the principal debt due the lender, and payments will be applied to such debt until it is satisfied. *Ib.*

3. *Cause of action. Laws governing. Tort.*

Whether or not an *ex delicto* cause of action exists upon a state of facts, is to be determined by the law of the place where the matters complained of occurred. *Pullman Car Co. v. Lawrence*, 732.

4. *Sleeping car company. Legal character. Laws of Illinois.*

Under the constitution of this state, all sleeping car companies are common carriers, but they are not technically so by the laws of Illinois. *Ib.*

5. *Punitive damages. Law of Illinois. Corporations.*

It is the settled law of Illinois that corporations are liable for all the acts of their agents and servants who commit wrong while performing the master's business in the scope of their employment, and this to the extent of liability for punitive damages in proper cases. *Ib.*

CONSTITUTION 1890.

1. § 147. Jurisdiction. Supreme court. Appeal. *Adams v. Bank*, 307.
Jurisdiction. Supreme court. Appeal. *Railroad Co. v. Le Blanc*, 650.
2. § 160. Jurisdiction. Circuit court. Ejectment. *Railroad Co. v. Le Blanc*, 650.
3. § 171. Jurisdiction. Justice of the peace. Amount in controversy. *Waters v. Railroad Co.*, 534.
4. § 193. Railroads. Defective appliance. Engineer. *Railroad Co. v. Guess*, 170.
5. § 195. Telegraph company. Discontinuance of office. Findings of railroad commission not conclusive. *Telegraph Co. v. Railroad Commission*, 80.
6. § 233. Eminent domain. Damages. Land outside of levee. *Duncan v. Levee Commissioners*, 125.
7. §§ 241, 242. Jury. Qualifications. Fourteenth amendment constitution United States. *Dixon v. State*, 271.
8. § 243. Poll tax. Distress. Nontaxable property. *Ratliff v. Beale*, 247.
9. § 244. Jury. Qualifications. Fourteenth amendment constitution United States. *Dixon v. State*, 271.

CONSTITUTIONAL LAW.

1. *Telegraph company. State police regulations.*

A telegraph company, engaged in domestic as well as interstate business, is subject to such reasonable police regulations as the state may impose. *Telegraph Co. v. Railroad Commission*, 80.

2. *Same. Chartered by another state. Lines erected by authority of congress.*

In such case it is immaterial that the company was chartered by another state and secured its right to erect its lines along the post roads in this state under an act of congress. *Ib.*

3. *Eminent domain. Damages. Land left outside a levee. Constitution 1890, § 238.*

On a condemnation of land for levee purposes, the owner is not entitled, under § 238, constitution 1890, to damages because a part of his land is left outside of the levee; but is entitled to damage caused by the levee itself, such as the obstruction of drainage on land so situate. *Duncan v. Levee Commissioners*, 125.

4. *Poll tax. Distress. Nontaxable property. Section 243, constitution 1890.*

Property which is exempt from taxation cannot be distrained to coerce the payment of a poll tax due from the owner, sec. 243 of the constitution of 1890 providing that the poll tax shall be a lien only on taxable property. *Ratliff v. Beale*, 247.

5. *Constitution of 1890. Jury laws enacted thereunder. Code 1892, § 2358.*

The constitution of 1890, and the jury laws enacted thereunder, are not obnoxious to the fourteenth amendment to the constitution of the United States because of discrimination on account of race, color or previous condition of servitude. *Gibson v. Mississippi*, 162 U. S. Repts., 565. *Dixon v. State*, 371.

6. *Same. Ratification. Representation in congress.*

The constitution of 1890 is not invalid because it was not submitted to and ratified by a vote of the people. Nor is it rendered inoperative because the state's representation in congress has not been reduced since its adoption. *Sproule v. Fredericks*, 69 Miss., 898. *Ib.*

7. *Same. Construction. Limitations thereon.*

This court, in construing the constitution of 1890, must look alone to the perfected work of the convention. It has no power to investigate the private individual purposes of the members of that body, and cannot consider their racial complexion. *Ib.*

8. *Same. Sections 241, 242, and 244.*

Sections 241, 242, and 244 of the constitution of 1890 are not in violation of the fourteenth amendment of the constitution of the United States upon the idea that they discriminate, or that they vest in administrative officers the power to discriminate, against citizens by reason of race, color or previous condition of servitude. *Ib.*

9. *Same. Jurors. Payment of taxes.*

While it is essential, under the constitution of 1890, that a juror shall be a qualified elector, yet it is unnecessary that he shall have produced satisfactory evidence of the payment of taxes to the officers holding an election; such payment may be proved before the court. *Ib.*

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10. *Criminal law. Removal to United States court. Negroes.*

If in the constitution or statutes of a state discrimination is made against negroes on account of race, color or previous condition of servitude, and they are by force thereof excluded from serving on juries, a defendant, whose race is so discriminated against, can remove a criminal prosecution against him to a court of the United States; but if the complaint is that by acts of officers of the state, charged with the administration of impartial laws, discrimination has been made against his race, the defendant must make defense in the state courts, and appeal, if need be, from the final judgment of the highest court of the state to the supreme court of the United States. *Ib.*

11. *Statutes.*

An act of the legislature should never be held to be violative of the constitution, unless the right of a litigant in the case before the court requires it to be done. *Adams v. Bank*, 307.

12. *Jurisdiction. Constitution 1890, § 147.*

If the chancery court overrules a demurrer to a bill in equity raising the question of its jurisdiction to subject specific property to the payment of a judgment at law, the record of which judgment has been destroyed, the supreme court cannot, under the constitution, § 147, review such question, there being no other error found in the record. *Day v. Hartman*, 489.

CONSTRUCTION OF STATUTES.

Argument ab inconvenienti.

The inconveniences that would result from construing a statute according to its terms cannot be considered as an aid to construction, when its terms are too plain to admit of doubt. *Powell v. Smith*, 142.

See STATUTES.

CONSTRUCTION OF WRITINGS.

See CONTRACTS, DEEDS AND WILLS.

CONTRACTS.

1. *Replevin. Reservation of title. Failure of consideration. Admissibility of evidence.*

In replevin by the vendor in a contract containing a reservation of title until payment of the purchase money, the vendee or his assignee may defend by proving a failure of consideration, in that

the subject of purchase, by reason of latent defects, did not come up to the representations made by the plaintiff at the time of sale, such proof being in legal contemplation the equivalent of payment. *Bloodworth v. Stevens*, 51 Miss., 475; *Bates v. Snider*, 59 Miss., 497; *Gabbert v. Wallace*, 66 Miss., 618; *Dreyfus v. Cage*, 62 Miss., 733, cited. *McKean v. Apparatus Co.*, 119.

2. *Wagering contracts. Judgment.*

A suit on a judgment rendered upon a note given for a gambling contract can be defeated by showing the illegality of the original transaction. *Campbell v. Bank*, 526.

3. *Same. Code 1880, § 990; Code 1892, § 2114.*

Judgments on any wager whatever are void under the statute (code 1880, § 990; code 1892, § 2114), and money lost on any wager can be recovered back by the loser. *Ib.*

4. *Same. Futures.*

A contract for the payment of differences in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid. *Ib.*

5. *Same. Repeal of statute. Code 1880, § 990; Laws 1882, p. 140.*

Repeals of statutes by implication are not favored. Code 1880, § 990, was not repealed by act of 1882 (Laws 1882, p. 140). The second section of the act of 1882 was idle and did not change the law already in force, so far as concerns contracts made in this state. *Ib.*

6. *Illegality. Right to withhold property.*

A party to a past transaction cannot withhold its gains from another party thereto on the ground of its illegality. *Gilliam v. Brown*, 43 Miss., 641; *Howe v. Jolly*, 68 *Ib.*, 323. *Andrews v. Brewing Association*, 362.

7. *Agency. Unilateral agreement. Nudum pactum.*

An agreement appointing an agent to sell land, the terms of which seek to bind only one of the parties thereto, is unilateral, and, until performance under it, without consideration. One may, at pleasure, ignore a nude promise. *Kolb v. Land Co.*, 567.

8. *Same. Land broker. Commissions.*

Such an agreement, where the owner himself sells the land before the agent finds a purchaser, cannot be made the basis of a suit by the agent for the commissions promised by its terms. *Ib.*

9. *Conflict of laws. Lex loci contractus. Lex solutionis.*

The law for the construction and enforcement of contracts made in one state to be performed in another, is accurately and clearly stated in the case of *Brown Brothers v. Freeland & Murdock*, 34 Miss., 181, and the syllabus to that case is commended. *Bank v. Auze*, 609.

10. *Indemnity. Pending suit. Offer of compromise.*

An agreement to save harmless another from any judgment that might be rendered against him in a pending suit, does not render the indemnitor liable for a sum offered by him in compromise of the suit, where the offer was refused and the suit determined in favor of the indemnitee. *Bedford v. Blythe*, 720.

11. *Same. Sale of land. Indemnity part of purchase money.*

If land be sold for part cash and in part for indemnity to the vendor from liability in a certain pending suit, and the suit be decided, contrary to the expectation of both contracting parties, in favor of the indemnitee, he cannot charge the lands sold to the indemnitor with any sum on account of the indemnity. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATIONS.

1. *Assignment. Insolvency. Directors preferred.*

While it has been decided in this state that an insolvent corporation may, in good faith, prefer creditors, yet the directors of such a corporation cannot, by their own votes and acts, prefer themselves. Whitfield, J., concurred in result, but favored overruling the cases which hold that insolvent corporations can make preferential assignments. *Love Mfg. Co. v. Queen City Mfg. Co.*, 290.

2. *Trespass. Jurisdiction. Citizenship. Location. Transitory action.*

It is no defense to a transitory action of trespass brought in this state that the wrong was done and injury inflicted in another state, and that both plaintiff and defendant, a foreign corporation, were, at the time, are now, and have been continuously since, residents and citizens of such other state. *Pullman Car Co. v. Lawrence*, 782.

3. *Foreign corporations. Jurisdiction. Code 1892, § 849.*

Under code 1892, § 849, foreign corporations may sue and be sued in this state as individual nonresidents may sue and be sued. *Ib.*

4. *Punitive damages. Law of Illinois. Corporations.*

It is the settled law of Illinois that corporations are liable for all the acts of their agents and servants who commit wrong while performing the master's business in the scope of their employment, and this to the extent of liability for punitive damages in proper cases. *Ib.*

5. *Same. Wealth of defendant.*

The wealth or pecuniary condition of a defendant may be shown with a view of enabling the jury to inflict proper damages by way of punishment in a case where punitive damages may be recovered. *Ib.*

6. *Proof of wealth.*

It is not impertinent or incompetent, where proof of the wealth of a corporation defendant is admissible, to inquire (a) the entire paid-up capital stock of the company; (b) what its liabilities are; (c) what are the assets of the company; (d) what was the surplus of the company over and above liabilities, and (e) what dividends had been paid stockholders for five years past, and how they were paid. *Ib.*

7. *Tort by agent. Ratification by principal.*

If a defendant corporation be advised by one of its superior agents of a tort against a stranger committed by a subordinate agent, and strenuously endeavors to prove that the act of its subordinate agent was not tortious, and, when sued for the wrong, makes an unwarranted and violent attack on the conduct and character of the plaintiff, a verdict against it is justified on the ground of its having ratified the wrong. *Ib.*

COSTS.

See FEES AND COSTS.

COUNTY.

1. *Title to land. Grantees of county. Estoppel.*

Purchasers claiming title to land under a deed from a county, cannot, in a suit by the county to cancel their deed, defend on the ground that the county was at the time of its purchase without power to acquire the property. *Jefferson County v. Grafton*, 435.

2. *Power to sell land.*

A county is not a municipal corporation proper, and, before § 304, code 1892, became operative, was not authorized to sell land, though the same was not applied to a public use. *Ib.*

COUNTY WARRANTS.

See WARRANTS.

CRIMINAL LAW AND PROCEDURE.

1. Instruction. Reasonable doubt. *Knight v. State*, 140.
2. Indictment. Incompetent testimony before grand jury. Grand jurors as witnesses. *Hammond v. State*, 214.
3. Reasonable doubt. Conscientious belief. Good character. *Hammond v. State*, 214.
4. Jury laws. Constitution 1890, §§ 241, 242, 244, and code 1892, § 2358, not in conflict with fourteenth amendment of federal constitution. *Dixon v. State*, 271.
5. Larceny. Ownership of property. Affidavit. *Hughes v. State*, 368.
6. Larceny. Promissory note. Value. Code 1892, § 1176. *McDowell v. State*, 373.
7. Justice of the peace. Failure to enter judgment. *Lunenberg v. State*, 379.
8. Carrying concealed weapons. Bodily harm. Apprehension. Code 1892, § 1027. Reasonable doubt. *Strother v. State*, 447.
9. Murder. Mere proof of killing. Instruction. Confession. Reasonable doubt. *Hunter v. State*, 515.
10. Bill of exceptions. Stenographer's notes. Limit of time. Agreement of attorneys. *Sanders v. State*, 531.
11. Indictment. Motion in arrest. Malice. Code 1892, § 1341. *Taylor v. State*, 544.
12. Murder. Evidence. Res gestæ. Examination of witness. Sudden encounter. Reasonable doubt. *King v. State*, 576.
13. Juror. Disqualification. Opinion of guilt. *Jeffries v. State*, 675.
14. Seduction. Chastity. Evidence. *Carroll v. State*, 688.
15. Extradition. Habeas corpus. Copy of indictment. *Ex parte Devine*, 715.
16. All participants in offenses principals. *Wiley v. State*, 727.
17. Reasonable doubt. Character. Instructions. *Powers v. State*, 777.
18. Unlawful sale of liquors. More than one sale. Evidence. Instructions. *Hymun v. State*, 829.

CROSSINGS.

See RAILROADS.

DAMAGES.

1. Railroads. Waters. Obstructions. Overflow. Former recovery.
An action against a railway company for such damage as has resulted to the upper of two adjoining tracts of plaintiff's land from

overflow, caused by an insufficient culvert and the erection of an embankment, is not barred by reason of his assignor's previous recovery of damages for the total destruction in value of the lower tract from the same cause. *Railroad Co. v. Wilbourn*, 284.

2. *Same. Peremptory instruction.*

It is the province of the jury to determine whether, or not, the injurious effects of the manner in which the natural flow of water has been obstructed by a railway company, are consistent with a due regard by such company for the rights of adjacent proprietors in the construction of its road. *Ib.*

3. *Same. Erroneous instruction.*

It is error, in an action for damages to plaintiff's lands resulting from an overflow, caused by an insufficient culvert and an embankment constructed by the defendant railroad company, to instruct the jury that the "plaintiff had the right to have the water, whether rain water or spring water, flow as they naturally would have flowed without any obstruction by the railroad," for an interference with the natural flow of water incident to a proper construction and use of its roadbed, imposes no liability upon the defendant. *Ib.*

4. *Slander.*

It is not error, in an action for slander, to refuse plaintiff an instruction to the effect that proof of damage is unnecessary, when the same fails to state that the jury must believe that the slanderous words were spoken by defendant. *Furr v. Speed*, 423.

5. *Chancery court. Jurisdiction. Nonresidents. Unliquidated demand.*

The chancery court has jurisdiction of a bill for relief filed against a nonresident of the state, having property here, to redress a wrong, even if the damages suffered by complainant are unliquidated. *Gordon v. Warfield*, 553.

6. *Trespass to land. Good faith. Measure of damages.*

Where defendant, in good faith, believing he owned the land, cut trees therefrom, he is liable to the real owner only for the value of the trees at the time of the taking. *Illinois, etc., R. R. Co. v. LeBlanc*, *post*, p. 626. *Bond v. Griffin*, 599.

7. *Evidence. Value. Offers to purchase.*

In a suit for damages for the taking of gravel from plaintiff's land, it is incompetent to prove offers to purchase made to plaintiff, and evidence of value based thereon should not be received. *Railroad Co. v. LeBlanc*, 626.

8. *Same. Prices paid.*

In such case testimony of prices paid for gravel spread upon the streets of a city, there being no evidence as to what it cost to place it on the streets, is incompetent; but if the cost of getting the material from the pit, and its transportation, etc., is shown, such evidence is admissible for consideration with other evidence in determining value. *Ib.*

9. *Same. Prices received by contractors.*

In such suit evidence of what contractors for paving the streets of a city with gravel received on their contracts, their profits and the amounts paid by the city for their guaranty to maintain the streets not being shown, is incompetent. *Ib.*

10. *Same. Purposes for which material used.*

In such case it is competent to prove any purpose for which the material could be used. *Ib.*

11. *Same. No market value. Actual sales. Other markets.*

Where the property to be valued cannot be definitely graded and has no market standard, but is frequently bought and sold, there is more scope in the admission of evidence in proof of value than in ordinary questions of value; and in such cases actual sales of like property, and market value at other places, accompanied by evidence of the cost of transportation thereto, etc., may be shown; but the value is to be determined from the whole evidence, and not from the prices received from sales in small quantities. *Ib.*

12. *Measure of damages.*

Where material has been taken from the land of another under an honest claim of title, or where the trespass was from ignorance, and was not wilful, damages will be confined to the value of the property *in situ*, and such other damages to the land as the taking may have caused. *Ib.*

13. *Estoppel. Volenti non fit injuria.*

Where defendant was in possession of and claimed to own a gravel pit, and plaintiff, doubting the validity of his own title thereto, accepted employment from defendant to load its cars with the gravel, he is not estopped thereby from recovering of defendant the value of the material taken during such employment; and the maxim *volenti non fit injuria* does not apply. *Ib.*

14. *Exemplary damages. Highway. Street railroad.*

Exemplary damages are not recoverable by the owner of a lot against a street railroad company for the erection of a structure in a highway so near plaintiff's lot as to obstruct free passage, where no

wanton conduct, wilful wrong, malice, oppression or insult is shown, and the structure is seasonably removed. *City Railroad Co. v. Maloney*, 738.

15. *Punitive damages. Law of Illinois. Corporations.*

It is the settled law of Illinois that corporations are liable for all the acts of their agents and servants who commit wrong while performing the master's business in the scope of their employment, and this to the extent of liability for punitive damages in proper cases. *Pullman Car Co. v. Lawrence*, 782.

16. *Same. Wealth of defendant.*

The wealth or pecuniary condition of a defendant may be shown with a view of enabling the jury to inflict proper damages by way of punishment in a case where punitive damages may be recovered. *Ib.*

17. *Proof of wealth. Corporation.*

It is not impertinent or incompetent, where proof of the wealth of a corporation defendant is admissible, to inquire (a) the entire paid-up capital stock of the company; (b) what its liabilities are; (c) what are the assets of the company; (d) what was the surplus of the company over and above liabilities, and (e) what dividends had been paid stockholders for five years past, and how they were paid. *Ib.*

18. *Excessive damages.*

There is no fixed standard for measuring damages in actions for torts. Each case must depend largely on its own facts. *Ib.*

DEADLY WEAPON.

See CRIMINAL LAW AND PROCEDURE.

DECREE.

See JUDGMENT AND DECREE.

DEED.

1. *Assignment. Decree on publication. Rehearing. Right of defendant's assignee. Code 1892, §§ 519, 520.*

The right given by §§ 519, 520, code 1892, to nonresident defendants against whom a final decree has been rendered on proof of publication only, to apply for a new hearing of the cause within two years thereafter, is assignable. *Fink v. Henderson*, 8.

2. *Same. Defendant's grantee.*

A conveyance of land vests in the grantee by way of assignment all the rights of action and defense that his grantor had in respect thereto. *Ib.*

3. *Evidence. Land patents. Book of entries of issuance. Copies therefrom primary evidence. Code 1892, § 1784.*

Under § 1784, code 1892, certified copies from the book of entries in the office of the land commissioner of the state, showing the issuance of patents, are primary evidence, and admissible in the same manner and with the same effect as the original patent. *Boddie v. Pardee*, 13.

4. *Acknowledgment. Sunday.*

The record of a deed is not invalidated, nor its effect as constructive notice impaired, because the acknowledgment is erroneously dated on Sunday. *Horne v. Nugent*, 102.

5. *Delivery. Witness. Code 1892, § 1740.*

Notwithstanding the death of the grantor in a deed, the testimony of the grantee in his own behalf is admissible to prove the delivery of the instrument as against one claiming under the same grantor by subsequent special warranty deed, a failure of the latter title imposing no liability on the decedent's estate. *Ib.*

6. *Life estate. "Convey and warrant." Code 1892, § 2479.*

Under § 2479, code 1892, the words "convey and warrant" are effective "to transfer all the right, title, claim and possession" of the grantor only when an intention to convey a less estate is not expressed in the deed. *Hart v. Gardner*, 153.

7. *Same. Construction.*

The proper end of all rules of construction is to effect the intention of the parties to the instrument, and this is true of deeds as well as of other writings. *Ib.*

8. *Tax titles. Invalid sale. Insufficient description.*

A tax collector's sale of land, not otherwise described than as "37 acres in the N. $\frac{1}{4}$ of Sec. 1, T. 13. R. 4," is void for uncertainty. *Sims v. Warren*, 67 Miss., 278, cited. *Nelson v. Abernathy*, 164.

9. *Husband and wife. Conveyances between. Acknowledgment. Notice. Code 1892, § 2294.*

Under § 2294, code 1892, providing that conveyances between husband and wife shall be invalid as against third persons, unless acknowledged and recorded, an unacknowledged deed from a husband to his wife is invalid as against the attaching creditors of

the husband, although recorded, and such creditors, prior to attaching, had actual notice of the conveyance and of its contents as they appeared of record. Citing *Montgomery v. Scott*, 61 Miss., 409. *Snider v. Udell Woodenware Co.*, 353.

10. *County. Title to land. Grantees of county. Estoppel.*

Purchasers claiming title to land under a deed from a county, cannot, in a suit by the county to cancel their deed, defend on the ground that the county was at the time of its purchase without power to acquire the property. *Jefferson County v. Grafton*, 435.

11. *Same. Power to sell land.*

A county is not a municipal corporation proper, and, before § 304, code 1892, became operative, was not authorized to sell land, though the same was not applied to a public use. *Ib.*

12. *Notice. Record of deed. Purchaser of timber.*

A person who buys standing timber, even if the seller be in possession, is bound to take notice of a deed from the seller then recorded, conveying the land to another without reservation of the timber. *Trust Co. v. Hardwood Co.*, 584.

13. *Same. Lis pendens.*

The pendency of a suit concerning lands is notice to the purchaser of the timber thereon, from a party to the suit, of the rights of complainant; and such notice, before the code of 1892 became operative, was effected by the mere pendency of the suit. *Ib.*

14. *Same. Sale by state. Irregularities. Laws 1878, p. 218.*

The validity of the state's patent to lands acquired under act of congress, September 4, 1841, which is made under laws of 1878, p. 218, cannot be questioned by one who does not claim under the United States or this state. *Godwin v. Davis*, 742.

15. *Lost deed. Evidence.*

Evidence to establish an alleged lost deed examined and adjudged insufficient. *Stovall v. Judah*, 747.

16. *Constructive notice. Trust deed. Record.*

Where a purchaser of land fails to record his deed, but the vendor duly records a deed of trust, given by the purchaser to secure the purchase money, the record of the latter is constructive notice to the trustee and beneficiaries therein of the rights of the purchaser. *Ib.*

17. *Same. Occupation. Unrecorded deed.*

The open, exclusive and continuous occupation of land, under an unrecorded deed, is constructive notice to creditors and subsequent purchasers of the occupant's right. *Ib.*

DEPOSITION.

Nonresident. Notice. Code 1892, § 1752.

Depositions taken without notice are not receivable in evidence. If the adverse party be nonresident, notice of the taking of depositions should be served on him, as provided by code 1892, § 1752, by filing the notice or interrogatories with the clerk for the time required. This section applies to depositions for use before masters in chancery, to whom the cause has been referred, to state an account between the parties. *Gordon v. Warfield*, 553.

DYING DECLARATION.

Declaration to accused by deceased. Conclusion.

A statement by decedent, otherwise admissible as a dying declaration, made to the accused in these words: "You have killed me without cause," is not incompetent because the expression of a mere conclusion. *Powers v. State*, 777.

EASEMENT.

See RAILROADS and ROADS AND STREETS.

EJECTMENT.

1. *Practice. Land taken for levee purposes. Ejectment not available. Statutory remedy exclusive. Act February 7, 1894 (Laws, p. 95).*

Ejectment does not lie for land taken for levee purposes by the Board of Levee Commissioners for the Yazoo-Mississippi Delta, even when compensation has not preceded the taking, since the act of February 7, 1894 (Laws, p. 95), provides an exclusive remedy of a different nature. *Owens v. Levee Commissioners*, 269.

2. *Railroads. Ejectment for right of way.*

While ejectment can be maintained against a railroad company for the possession of its right of way, yet execution of such a judgment should be stayed for a reasonable time, to enable the company to institute and prosecute a condemnation proceeding to acquire a right to the way. *Railroad Co. v. LeBlanc*, 650.

EMINENT DOMAIN.

1. *Damages. Land left outside a levee. Constitution 1890, § 238.*

On a condemnation of land for levee purposes, the owner is not entitled, under § 238, constitution 1890, to damages because a part of his land is left outside of the levee; but is entitled to damage caused by the levee itself, such as the obstruction of drainage on land so situate. *Duncan v. Levee Commissioners*, 125.

2. *Mortgagee. Laws of 1884, p. 166.*

Whether a mortgagee be, or be not, a proper party to a condemnation proceeding, a payment by the levee board, with full knowledge of the mortgage, to the mortgagor of the damages awarded, will not, under laws 1884, p. 166, preclude a suit therefor by the mortgagee. *Levee Board v. Wborn*, 396.

3. *Improvements. Public purposes.*

The general rule that things affixed to the freehold by trespassers belong to the owner of the soil, is not applicable as against a body having the right of eminent domain and who has wrongfully entered and made improvements for the public purposes for which it was created and given the right. *Railroad Co. v. LeBlanc*, 650.

EMPLOYEE.

See LIENS, AGRICULTURAL.

EQUITY.

See CHANCERY COURT.

ESTATE OF DECEDENT.

Attorney's services. Fund realized.

An attorney employed by some of the creditors of an insolvent estate, who realizes by his services a fund for distribution among all the creditors, cannot have the fund charged with his fees, but must look alone to those who employed him for compensation. *Rives v. Patty*, 381.

ESTOPPEL.

1. *Delivery of assets to successor.*

When a guardian neglects to collect a solvent note due him as such, and delivers the same to his successor, his wards, in contesting his account, are not estopped from charging him and his sureties as if he had actually collected the money due on the note, with interest,

by the fact that they had reduced the note to judgment against the maker, even where the guardian is himself the maker of the note, credit being given, however, for what was realized by the suit. *Ames v. Williams*, 404.

2. *Compromise. Offers. Statement of value.*

The fact that a plaintiff has offered to accept a sum of money in full settlement of damages for the destruction of his property by fire, and stated the property to be of such value, does not preclude him, on the rejection of the offer, from recovering such greater sum as the proof may warrant. *Railroad Co. v. Stinson*, 453.

EVIDENCE. .

1. *Land patents. Book of entries of issuance. Copies therefrom primary evidence. Code 1892, § 1784.*

Under § 1784, code 1892. certified copies from the book of entries in the office of the land commissioner of the state, showing the issuance of patents, are primary evidence, and admissible in the same manner and with the same effect as the original patent. *Boddie v. Pardee*, 13.

2. *County warrants. Judicial records. Burden of proof.*

When the petitioner in mandamus to compel payment of certain county warrants, some of which are drawn by order of the board of police, some by order of the circuit court, and some by order of the probate court, has shown regular orders of the board and of said courts, and proved in evidence the warrants regularly issued thereon, or has proved competently the loss or destruction of these records, together with docket memoranda, in part, and shows the regular warrants, or, having so shown the loss and destruction of said records, shows in evidence such warrants regularly issued, without any aiding memoranda docket entries, the burden is on defendant to show that the claims are illegal or fraudulent. *Taylor v. Chickasaw County*, 23.

3. *Same. Secondary evidence. Loss and destruction of records. Authenticity of record book.*

Parol evidence is admissible to prove the loss and destruction of the records and files of the circuit court, and as to the authenticity of a minute book, except in so far as it is hearsay or purports to state customs of the officers in discharging their duties where the law prescribes the manner in which they shall discharge them. *Ib.*

4. *Same. Tax collector's deed. Prima facie validity of sale. Code 1890, § 526.*

The testimony of a tax collector that he did not see how he could

have sold a tract of land at tax sale in the smallest legal subdivisions, as required by law, unless he had a map of it, and that he did not remember that he had a map, is insufficient to overcome the effect of his deed, under § 526, code 1880, as "*prima facie* evidence that the assessment and sale of the land were legal and valid." *Mixon v. Clevenger*, 67.

5. *Same. Irregularities attending sale. Testimony of the tax collector inadmissible.*

The testimony of a tax collector that he failed to offer a tract of land sold by him for taxes in the smallest legal subdivisions, as required by law, is inadmissible, as going to impeach his own official conduct. *Ib.*

6. *Conversations. Admissions.*

In a suit by a wife against her father-in-law, for inducing her husband to abandon her, conversations between the plaintiff and defendant after the abandonment are admissible, though not in the nature of confessions by defendant, if they tend to show the motives with which defendant acted in the matter charged. *Tucker v. Tucker*, 93.

7. *Female witness. Character for truth. Chastity.*

The character of a female witness for truth may not be impeached by showing her to be of probable unchaste character. (*Whitfield, J., dubitante.*) But if a party show by his own female witness that the witness was seen in a brothel, and facts tending to show that she was entrapped therein by his adversary, the whole matter may be inquired into. *Ib.*

8. *Replevin. Reservation of title. Failure of consideration. Admissibility of evidence.*

In replevin by the vendor in a contract containing a reservation of title until payment of the purchase money, the vendee or his assignee may defend by proving a failure of consideration, in that the subject of purchase, by reason of latent defects, did not come up to the representations made by the plaintiff at the time of sale, such proof being in legal contemplation the equivalent of payment. *Bloodworth v. Stevens*, 51 Miss., 475; *Bates v. Snider*, 59 Miss., 497; *Gabbert v. Wallace*, 66 Miss., 618; *Dreyfus v. Cage*, 62 Miss., 733, cited. *McKean v. Apparatus Co.*, 119.

9. *Exclusion by the court.*

It is error to exclude all the plaintiff's evidence, on motion of defendant, if the testimony of any witness makes out, or tends to make out, the case. *State v. Spengler*, 129.

10. *Same. Motion to exclude reserved. No action by trial court.*

When the trial court reserves its decision on a motion to exclude a part of the testimony of one of plaintiff's witnesses, and afterwards excludes all the evidence offered in his behalf, the appellate court will not review the question so reserved. *Ib.*

11. *Dramshop keeper. Suit on bond. Code 1892, § 1582.*

In a suit upon a dramshop keeper's bond, under § 1582, code 1892, it is not necessary for the plaintiff to prove his case beyond a reasonable doubt, but only with reasonable certainty. *Ib.*

12. *Writings. Effect on collateral fact. Province of judge.*

To interpret the meaning of a writing unaffected by parol testimony is the province of the judge; but its effect as evidence of a collateral fact—as waiver—is for the jury. *Powell v. Smith*, 142.

13. *Taxation. Assessment. Misdescription. Parol evidence. *Collateral attack.*

In the absence of fraud, a misdescription in a perfected and approved assessment cannot, in a collateral attack, be shown by parol. *Bank v. Adams*, 179.

14. *Same. Grand jurors as witnesses.*

Grand jurors are incompetent witnesses to prove upon what evidence an indictment was found. *Hammond v. State*, 214.

15. *Same. Reasonable doubt. Instruction. Conscientious belief.*

The word "conscientiously" is a word of quality and not of quantity, and ought not to be used in charges as to a reasonable doubt, but if the charge be that the jury, before convicting, must take into consideration all the evidence and "conscientiously" believe, beyond a reasonable doubt, defendant guilty, the word is mere surplusage. *Ib.*

16. *Same. Good character.*

The influence of evidence showing the good character of defendant should be left to the jury, and the court should not instruct that it is, or is not, sufficient to raise a reasonable doubt of guilt. *Ib.*

17. *Res gestæ. Agent. Declarations.*

The declaration of a railroad section foreman, who set out fire on the right of way of a railroad company, while the fire is yet burning, as to the origin of the fire, are admissible in evidence in an action against the railroad company for loss resulting from the fire, as part of the *res gestæ*. *Railroad Co. v. Stinson*, 453.

18. *Peremptory instruction. Material evidence.*

A peremptory instruction for defendant ought not to be given at the close of the evidence because of the omission by plaintiff to prove material averments of the declaration, where the plaintiff contends that such facts were proved, and offers, if mistaken, to reintroduce a witness to establish them. *French v. Railroad Co.*, 542.

19. *Admissions. Written contract.*

When a party, by admissions, has qualified his right, one who holds under him succeeds only to the right thus qualified, and the admissions are, ordinarily, competent evidence; but evidence of such admissions are incompetent where they contradict the terms of a written contract between the parties. *Johnson v. Johnson*, 549.

20. *Same. Receipt.*

A receipt may embody the terms of a contract for the appropriation of the payment, as well as acknowledge the reception of the money; and the contract features of such an instrument cannot be varied by parol evidence. *Id.*

21. *Depositions. Code 1892, § 1752.*

Depositions taken without notice are not receivable in evidence. If the adverse party be nonresident, notice of the taking of depositions should be served on him, as provided by code 1892, § 1752, by filing the notice or interrogatories with the clerk for the time required. This section applies to depositions for use before masters in chancery, to whom the cause has been referred, to state an account between the parties. *Gordon v. Warfield*, 553.

22. *Interpleader. Code 1892, § 714.*

A defendant, when sued upon a contract made with the plaintiff for the price of timber cut from land, can, under code 1892, § 714, interplead a third person who claims ownership of the land and of the trees cut therefrom. And in such case, the party interpleaded should be permitted to show title to the land from which the trees were cut, and that plaintiff had no title thereto. *Boyle v. Manion*, 572.

23. *Criminal law. Res gestæ.*

The declarations of a defendant, made some hours after the homicide for which he is on trial, are not admissible as a part of the *res gestæ*. *King v. State*, 576.

24. *Same. Examination of witness. Practice. Discretion.*

Witnesses in rebuttal should be confined to matters in rebuttal, and
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not allowed to repeat their evidence in chief; but this matter is largely in the discretion of the court. *Ib.*

25. *Same. Murder. Sudden encounter. Instruction.*

Murder may be committed in a sudden encounter, and if previous recent threats to kill deceased or do him great bodily harm are proved to have been made by defendant, an instruction, asked by defendant, which directs the jury to disregard the evidence of such threats, and which ignores the idea that the purpose to kill may have been pursuant to the malice indicated by the threats, is properly refused. *Ib.*

26. *Same. Onus probandi. Reasonable doubt.*

It is not the law of homicide that if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder unless he has by his evidence proved excuse or justification; nothing more in such case is required of a defendant than to raise a reasonable doubt of his guilt from the whole evidence. *Ib.*

27. *Erroneous admission. Reversal.*

If a plaintiff so far fails to make out his case that a peremptory instruction could rightfully be given against him, he cannot reverse the judgment for defendant because the trial court permitted defendant to introduce incompetent evidence. *Blackwell v. Graham*, 595.

28. *Value. Offers to purchase.*

In a suit for damages for the taking of gravel from plaintiff's land, it is incompetent to prove offers to purchase made to plaintiff, and evidence of value based thereon should not be received. *Railroad Co. v. LeBlanc*, 626.

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In such case testimony of prices paid for gravel spread upon the streets of a city, there being no evidence as to what it cost to place it on the streets, is incompetent; but if the cost of getting the material from the pit, and its transportation, etc., is shown, such evidence is admissible for consideration with other evidence in determining value. *Ib.*

30. *Same. Prices received by contractors.*

In such suit evidence of what contractors for paving the streets of a city with gravel received on their contracts, their profits and the amounts paid by the city for their guaranty to maintain the streets not being shown, is incompetent. *Ib.*

31. *Same. Purposes for which material used.*

In such case it is competent to prove any purpose for which the material could be used. *Ib.*

32. *Same. No market value. Actual sales. Other markets.*

Where the property to be valued cannot be definitely graded and has no market standard, but is frequently bought and sold, there is more scope in the admission of evidence in proof of value than in ordinary questions of value; and in such cases actual sales of like property, and market value at other places, accompanied by evidence of the cost of transportation thereto, etc., may be shown; but the value is to be determined from the whole evidence, and not from the prices received from sales in small quantities. *Ib.*

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Where material has been taken from the land of another under an honest claim of title, or where the trespass was from ignorance, and was not wilful, damages will be confined to the value of the property *in situ*, and such other damages to the land as the taking may have caused. *Ib.*

34. *Estoppel. Volenti non fit injuria.*

Where defendant was in possession of and claimed to own a gravel pit, and plaintiff, doubting the validity of his own title thereto, accepted employment from defendant to load its cars with the gravel, he is not estopped thereby from recovering of defendant the value of the material taken during such employment; and the maxim *volenti non fit injuria* does not apply. *Ib.*

35. *Tax deed. Decree confirming. Ambiguity. Code 1892, § 3776.*

Under § 3776, code 1892, in an action of ejectment on a tax collector's deed and a decree confirming the same, wherein the land is described as "fractional thirty-eight acres" in a certain forty-acre tract assessed to a certain party, it is admissible to offer in evidence the assessment rolls, tax receipts and deeds which identify the remaining two acres, on which the taxes were paid, and thereby identify the land sold for taxes, and the description in the decree of confirmation may be thus aided as well as the tax deed. *Railroad Co. v. LeBlanc*, 650.

36. *Primary. Secondary.*

The best evidence should be produced, or its absence accounted for, after failure of efforts to secure it, before secondary evidence is admissible. *Weiler & Haas v. Monroe County*, 682.

37. *Same. Lost writing.*

The party seeking to introduce evidence of the contents of a writing

said to be lost or destroyed, must first give some evidence that the original once existed. *Ib.*

38. *Chastity. Reputation.*

It is competent, as one of the elements of proof of actual chastity, to show that the woman had the reputation of being chaste. *Carroll v. State*, 688.

39. *Witness. Prosecutrix. Contradiction.*

If a question be asked a prosecutrix in seduction whether she had made a certain declaration, and the witness answers, notwithstanding an objection sustained to the question, denying the declaration, and the answer is not excluded, evidence contradicting such answer is admissible. *Ib.*

40. *Lost deed.*

Evidence to establish an alleged lost deed examined and adjudged insufficient. *Stovall v. Judah*, 747.

41. *Criminal law. Reasonable doubt. Instruction.*

An instruction which undertakes to define a reasonable doubt ought not to be given. *Brown v. State*, 72 Miss., 95; *Burt v. State. Ib.*, 408, approved. *Powers v. State*, 777.

42. *Same. Character.*

Evidence of the good character of the accused should be left to the jury without any instruction from the court as to its value. *Ib.*

43. *Same. Declaration to accused by deceased. Dying declaration. Conclusion.*

A statement by decedent, otherwise admissible as a dying declaration, made to the accused in these words: "You have killed me without cause," is not incompetent because the expression of a mere conclusion. *Ib.*

EXECUTION.

1. *Unlawful detainer. Purchaser at execution sale. Tenant of defendant in execution. Purchaser an assign. Code 1892, § 4461.*

Under § 4461, code 1892, a purchaser of land at execution sale may maintain the action of unlawful detainer against a tenant of the defendant in execution, who "withholds possession after the expiration of his right," the purchaser having become, by the act of the law, the "assign of him who is so deprived of possession, or from whom possession is so withheld." *Glenn v. Caldwell*, 49.

2. *Execution sale. Purchaser. Volunteer.*

A purchaser at an execution sale is a mere volunteer, and takes only such title as the execution debtor had, and with all of its infirmities. *Horne v. Nugent*, 102.

EXECUTORS AND ADMINISTRATORS.

See ESTATE OF DECEDENT.

EXTRADITION.

1. *Guilt or innocence. Habeas corpus.*

Where relator is arrested for crime committed in another state, upon the warrant of the governor of this state authorizing extradition, the guilt or innocence of relator cannot be inquired into on *habeas corpus* in this state. *Ex parte Devine*, 715.

2. *Habeas corpus. Return. Exception. Governor's warrant.*

Upon *habeas corpus* it is not cause of exception to the officer's return, showing that relator is held upon the warrant of the governor of this state for extradition for crime committed in another state, that it does not show an affidavit or indictment emanating from the authorities of the other state. The warrant of the governor is *prima facie* correctly issued, and the return, to be *prima facie* sufficient, need not show anything more. *Ib.*

3. *Same. Copy of indictment.*

Upon *habeas corpus* in such case, the relator may show, as a fact, if he can, that the warrant for extradition was issued by the governor of this state without having received from the chief executive of the other state a copy of the affidavit or indictment charging the relator with crime in such other state. *Ib.*

4. *Code 1892, § 2162.*

The power of the executive to extradite fugitives from justice is conferred, and the conditions of its exercise are prescribed, by code 1892, § 2162, and special statutory authority, even when applied to the acts of public officers, must be strictly executed and all prescribed formalities observed. *Ib.*

FARM CROSSINGS.

See RAILROADS.

FEES AND COSTS.

1. *Tax collector. Advertisement of land. Code 1892, § 3811.*

Under § 3811, code 1892, if the taxes on lands are unpaid after the fifteenth day of January, the tax collector is vested with a limited discretion as to when the advertisement of the lands for sale is to be made. He may advertise them on the sixteenth day of January, or any succeeding day, so that they are advertised for three weeks before the day of sale. *Miller v. Land Co.*, 110.

2. *Same. Fees, ten per centum damages. Code 1892, § 2021.*

Under § 2021, code 1892, a tax collector is entitled to ten per centum on all taxes not paid until after December 15 and after legal action has been begun to coerce payment, and legally advertising the property for sale is such action. *Ib.*

3. *Same. Injunction.*

The tax collector will not be enjoined from collecting the ten per centum provided by law on the grounds that the publication could have been begun later, and that the collector knew the taxes would be paid. *Ib.*

4. *Same. Payment after action begun.*

Though a tax collector's proceedings to enforce collection be interrupted by payment of the taxes, he will be entitled to the per centum because of coercive action begun. *Ib.*

5. *Assessor. Fees of. Laws 1894, p. 28.*

The additional compensation, not exceeding ten cents for each individual assessed on the personal roll, may or may not be allowed, within the discretion of the board of supervisors. *Williams v. Sharkey County*, 122.

6. *Witness fees. Commitment. Per diem allowable. Code 1892, §§ 1987, 2023 to 2026 inclusive.*

A witness for the state in a criminal prosecution who has been committed to jail to secure his appearance before the circuit court, is not, under §§ 1987 to 2026 inclusive, code 1892, entitled to a per diem allowance of fees for the whole period of his detention, but only for that covered by his attendance upon the court when in session. *Marshall County v. Tidmore*, 317.

7. *State revenue agent. Costs. Code 1892, §§ 4194, 4199.*

Where judgment is obtained by the state revenue agent for money and costs, and a sum is realized on execution insufficient to satisfy the whole, the officers of the court may retain their costs out of the

collection; and code 1892, §§ 4194, 4199, does not authorize the state revenue agent to demand the entire collection, leaving the costs unpaid. *Adams v. Evans & Co.*, 886.

FENCES.

See STOCK LAW.

FIRE INSURANCE.

See INSURANCE, FIRE.

FIRES.

See NEGLIGENCE.

FIXTURES.

1. *Landlord and tenant. Cotton gin.*

If a tenant buys and puts a cotton gin, condenser, and feeder upon the leased premises, with the intention of removing them, they do not become fixtures so as to belong to the landlord as against the vendee of the tenant who purchases during the lease. *Tate v. Blackburne*, 48 Miss., 1, and *Jennings v. Wilson*, 71 Miss., 42, distinguished. *McMath v. Levy*, 450.

2. *General doctrine. Exceptions.*

To the general doctrine in relation to fixtures made by one upon the premises of another, there are generous exceptions in favor of trade, manufactures, and tenants. *Ib.*

FRAUDS, STATUTE OF.

1. *Trial of right of property. Business sign. Code 1892, § 4234.*

The goods of a merchant, whose business sign does not indicate ownership in the defendant in execution, are not liable to the creditor of such defendant because the merchant caused goods, purchased by him, to be shipped in such defendant's name, and carried on the business correspondence and paid privilege tax in such name, without the knowledge or consent of the party whose name was so used. *Albin v. Howard*, 370.

2. *Parol agreement. Standing timber.*

A parol agreement authorizing the cutting of standing timber on lands, is within the statute of frauds. *Walton v. Lowrey*, 484.

3. *License. Revocable.*

A sale of growing timber by parol is a license, and authorizes an entry upon the land, but the same is revocable at the will of the seller. *Ib.*

FRAUDULENT CONVEYANCES.

1. *Mortgage. Foreclosure. Defense.*

In a suit to foreclose a mortgage, if the mortgagee makes out a *prima facie* case not disclosing fraud, the mortgagor cannot successfully defend by showing that the deed was executed to defraud his creditors, and that the mortgagee was a party to the fraud. *Barwick v. Moyse*, 415.

2. *Good between parties.*

Though a mortgage be executed with intent to defraud the creditors of the mortgagor, it is nevertheless good between the parties. *Ib.*

3. *Mortgages. Right of mortgagor. Consumptive use. Fraud on creditors.*

A mortgage, executed by a manufacturing company on its products, wherein is reserved to the mortgagor the right to keep, use and sell them in the usual course of business, is fraudulent as to the creditors of the mortgagor. *Bank v. Caperton*, 857.

4. *Same. Right of mortgagee. Seizure.*

Such a mortgage is not rendered valid by a provision that in case the mortgagor should sell the property, or any interest therein, that the mortgagee should take immediate possession for the purposes of the mortgage. *Ib.*

5. *Pledge. Possession.*

Possession of the property and good faith on the part of the pledgee are both necessary to constitute a valid pledge as against the rights of creditors of the pledgor. *Ib.*

FUTURES.

See CONTRACTS.

GRAND JURY.

See JURY.

GUARDIAN AND WARD.

1. *Accounting. Bond.*

A guardian and his sureties are accountable not only for money collected by him, but also for money which he might and could have collected by proper diligence. *Ames v. Williams*, 404.

2. *Same. Delivery of assets to successor. Estoppel.*

When a guardian neglects to collect a solvent note due him as such, and delivers the same to his successor, his wards, in contesting his account, are not estopped from charging him and his sureties as if he had actually collected the money due on the note, with interest, by the fact that they had reduced the note to judgment against the maker, even where the guardian is himself the maker of the note, credit being given, however, for what was realized by the suit. *Ib.*

3. *Chancery court. Guardian's sale of land. Rights of purchaser. Notice.*

One who claims under a guardian's sale, that was neither reported to nor confirmed by the court, nor made in compliance with the decree ordering it, is affected with notice of the infirmity in his title, and cannot claim the land as a *bona fide* purchaser for value, there being no evidence of payment of the purchase money save a somewhat vague recital in the guardian's void conveyance of a payment of one-half thereof at the time of sale. *Hicks v. Blakeman*, 459.

4. *Same. Improvements.*

One who, claiming under a guardian's sale that is void for want of confirmation and noncompliance with the decree ordering it, enters upon the land under the guardian's deed, and, in the honest belief that his title is good, makes permanent improvements thereon, is entitled to a decree for such improvements on the establishment of an adverse title. *Cole v. Johnson*, 53 Miss., 94, cited. *Ib.*

5. *Same. Measure of recovery.*

The amount that the market value of the land is enhanced by the improvements made thereon, in good faith, by one claiming under the void conveyance of a guardian, is the proper measure of his recovery on account thereof. *Nixon v. Porter*, 38 Miss., 401; *Wille v. Brooks*, 48 *Ib.*, 542; *Clark v. Hornthull*, 47 *Ib.*, 434; *Massey v. Womble*, 69 *Ib.*, 347, cited. *Ib.*

6. *Final settlement. Surcharging account.*

In case a guardian makes a final settlement in the court with the ward, who has become adult, and the ward appears and files an answer, admitting the correctness of the account, and acknowledges receipt of the balance shown to be due, and the court approves the settlement and decrees the payment to have been made, and the ward afterwards files a bill denying the payment and seeking to surcharge the account, and the material facts thereof are denied by the answer to the bill, a decree dismissing the bill and refusing to open the account is correct, if the evidence establishes the truth of the answer. *Gillcullen v. McKinney*, 764.

HABEAS CORPUS.

1. *Extradition. Guilt or innocence.*

Where relator is arrested for crime committed in another state, upon the warrant of the governor of this state authorizing extradition, the guilt or innocence of relator cannot be inquired into on *habeas corpus* in this state. *Ex parte Devine*, 715.

2. *Same. Return. Exception. Governor's warrant.*

Upon *habeas corpus* it is not cause of exception to the officer's return, showing that relator is held upon the warrant of the governor of this state for extradition for crime committed in another state, that it does not show an affidavit or indictment emanating from the authorities of the other state. The warrant of the governor is *prima facie* correctly issued, and the return, to be *prima facie* sufficient, need not show anything more. *Ib.*

3. *Same. Copy of indictment.*

Upon *habeas corpus* in such case, the relator may show, as a fact, if he can, that the warrant for extradition was issued by the governor of this state without having received from the chief executive of the other state a copy of the affidavit or indictment charging the relator with crime in such other state. *Ib.*

4. *Same. Code 1892, § 2162.*

The power of the executive to extradite fugitives from justice is conferred, and the conditions of its exercise are prescribed, by code 1892, § 2162, and special statutory authority, even when applied to the acts of public officers, must be strictly executed and all prescribed formalities observed. *Ib.*

HIGHWAY.

See ROADS AND STREETS.

HOMICIDE.

1. *Quo animo of defendant's acts.*

Upon trial of an indictment for murder, it being shown that defendant shot at one person and killed another, the state may introduce evidence to prove defendant's hostile feelings towards the person against whom the shot was aimed. *Dixon v. State*, 271.

2. *Instruction.*

An instruction which authorizes a conviction of murder upon mere proof of the killing is erroneous. *Kearney v. State*, 68 Miss., 239, approved. *Hunter v. State*, 515.

3. *Evidence. Res gestæ.*

The declarations of a defendant, made some hours after the homicide for which he is on trial, are not admissible as a part of the *res gestæ*. *King v. State*, 576.

4. *Examination of witness. Practice. Discretion.*

Witnesses in rebuttal should be confined to matters in rebuttal, and not allowed to repeat their evidence in chief; but this matter is largely in the discretion of the court. *Ib.*

5. *Sudden encounter. Instruction.*

Murder may be committed in a sudden encounter, and if previous recent threats to kill deceased or do him great bodily harm are proved to have been made by defendant, an instruction, asked by defendant, which directs the jury to disregard the evidence of such threats, and which ignores the idea that the purpose to kill may have been pursuant to the malice indicated by the threats, is properly refused. *Ib.*

6. *Onus probandi. Reasonable doubt.*

It is not the law of homicide that if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder unless he has by his evidence proved excuse or justification; nothing more in such case is required of a defendant than to raise a reasonable doubt of his guilt from the whole evidence. *Ib.*

7. *Declaration to accused by deceased. Dying declaration. Conclusion.*

A statement by decedent, otherwise admissible as a dying declaration, made to the accused in these words: "You have killed me without cause," is not incompetent because the expression of a mere conclusion. *Powers v. State*, 777.

HUSBAND AND WIFE.

1. *Action by wife against one inducing her abandonment. Liability of husband's father therefor.*

A father is liable in damages to the wife of his son for maliciously persuading the son to abandon her, although not held to the rigid accountability imposed upon strangers—the gravamen of the action against a parent being malice. *Tucker v. Tucker*, 93.

2. *Conveyances between. Acknowledgment. Notice. Code 1892, § 2294.*

Under § 2294, code 1892, providing that conveyances between husband and wife shall be invalid as against third persons, unless acknowledged and recorded, an unacknowledged deed from a husband to his wife is invalid as against the attaching creditors of

the husband, although recorded, and such creditors, prior to attaching, had actual notice of the conveyance and of its contents as they appeared of record. Citing *Montgomery v. Scott*, 61 Miss., 409. *Snider v. Udell Woodenware Co.*, 353.

HUTCHINSON'S MISSISSIPPI CODE.

Not a revision. Laws omitted therefrom not repealed.

The compilation of laws known as "Hutchinson's Mississippi Code" is not a code or revision, and had not the effect of repealing existing statutes of a general and public nature not included therein. *Taylor v. Chickasaw County*, 23.

INDEMNIFYING BOND.

See INDEMNITY.

INDEMNITY.

1. *Attachment levy. Indemnifying bond. Damages.*

Attorneys' fees, and other expenses incurred in sustaining a claimant's issue for property seized under attachment, are not ordinarily recoverable in a suit on an indemnifying bond. *Moore v. Lowrey*, 413.

2. *Same. Wilful wrong.*

Knowledge by a plaintiff in attachment, and of his attorney, that a bill of sale to personal property has been executed by the defendant in execution and duly recorded, does not make a levy thereon a wilful wrong. *Ib.*

3. *Indemnity against pending suit. Offer of compromise.*

An agreement to save harmless another from any judgment that might be rendered against him in a pending suit, does not render the indemnitor liable for a sum offered by him in compromise of the suit, where the offer was refused and the suit determined in favor of the indemnitee. *Bedford v. Blythe*, 720.

4. *Same. Sale of land. Indemnity part of purchase money.*

If land be sold for part cash and in part for indemnity to the vendor from liability in a certain pending suit, and the suit be decided, contrary to the expectation of both contracting parties, in favor of the indemnitee, he cannot charge the lands sold to the indemnitor with any sum on account of the indemnity. *Ib.*

INDICTMENT.

1. *Incompetent testimony before grand jury.*

An indictment should not be quashed because the grand jury heard incompetent testimony. *Hammond v. State*, 214.

2. *Motion in arrest.* Code 1892, § 1341.

Notwithstanding the provisions of code 1892, §§ 1341, 1354, a judgment in a felony case should be arrested if the indictment be so defective that the nature and cause of the accusation is not clearly and fully stated. *Cook v. State*, 72 Miss., 517, cited. *Taylor v. State*, 544.

3. *Malice.*

All indictments for felony must contain the averment that the act was committed with malice aforethought, or equivalent words, otherwise the defect is fatal. *Maxwell v. State*, 68 Miss., 339; *Jesse v. State*, 29 Miss., 100, cited. *Ib.*

4. *Same.* Code 1892, § 1255. *Malice.*

An indictment, under code 1892, § 1255, which fails to aver that the poison was mingled with intent maliciously to kill, etc., is defective. Malice must be charged of the intent to kill, etc. *Ib.*

INJUNCTION.

1. *Effort to sell under trust deed for more than was due.*

If an effort be made under a deed of trust to sell the property for largely more than the sum due, an injunction may properly be issued. *Curey v. Fulmer*, 729.

2. *Attorneys' fees on dissolution.*

Where a suit in equity is alone for injunction, and its issuance is preliminarily obtained, and it is afterwards dissolved, the complainant being cast in the suit, the defendant is entitled to recover attorneys' fees necessarily incurred in defending the whole case. *Jamison v. Dulaney*, 890.

INSTRUCTIONS.

1. *Peremptory instruction.*

If there be a conflict of evidence as to whether the words charged in an action for slander were spoken, it is proper to refuse a peremptory instruction for the plaintiff. *Furr v. Speed*, 423.

2. *Damages.*

It is not error, in an action for slander, to refuse plaintiff an instruction to the effect that proof of damage is unnecessary, when the same fails to state that the jury must believe that the slanderous words were spoken by defendant. *Ib.*

3. *Slander. Poisoning. Erroneous instruction.*

If the defendant is shown to have charged plaintiff with having poisoned him, an instruction that before plaintiff can recover, the jury must believe that defendant spoke the words with the intent to say that the plaintiff intentionally poisoned him, is erroneous. *Ib.*

4. *Criminal law. Murder.*

An instruction which authorizes a conviction of murder upon mere proof of the killing is erroneous. *Kearney v. State*, 68 Miss., 239, approved. *Hunter v. State*, 515.

5. *Peremptory instruction. Material evidence.*

A peremptory instruction for defendant ought not to be given at the close of the evidence because of the omission by plaintiff to prove material averments of the declaration, where the plaintiff contends that such facts were proved, and offers, if mistaken, to reintroduce a witness to establish them. *French v. Railroad Co.*, 542.

6. *Same. Murder. Sudden encounter.*

Murder may be committed in a sudden encounter, and if previous recent threats to kill deceased or do him great bodily harm are proved to have been made by defendant, an instruction, asked by defendant, which directs the jury to disregard the evidence of such threats, and which ignores the idea that the purpose to kill may have been pursuant to the malice indicated by the threats, is properly refused. *King v. State*, 576.

7. *Criminal law. Reasonable doubt.*

An instruction which undertakes to define a reasonable doubt ought not to be given. *Brown v. State*, 72 Miss., 95; *Burt v. State*, *Ib.*, 408, approved. *Powers v. State*, 777.

8. *Same. Evidence. Character.*

Evidence of the good character of the accused should be left to the jury without any instruction from the court as to its value. *Ib.*

9. *Unlawful sale of liquors. Distinct sales.*

It is error, upon the trial of a defendant for the unlawful sale of intoxicating liquor, to admit evidence of more than one sale, and, if

such evidence is admitted without objection, it is error to give an instruction for the state which ignores the rule in such cases that the conviction must be predicated of one sale. *Hyman v. State*, 829.

INSURANCE, FIRE.

1. *Interest in property.*

Whoever may be fairly said to have a reasonable expectation of pecuniary advantage from the preservation of property, whether personally or as the representative of others, has an insurable interest therein. *Hope, etc., Co. v. Phoenix, etc., Co.*, 320.

2. *Same. Privilege tax.*

In case of suit on a policy issued to a person so interested in the property, it is not a defense that other persons having an interest therein acquired their interest in the course of a business subject to a privilege tax due and unpaid. *Ib.*

3. *Same. Interest of others.*

It is not a defense to such a case that certain other parties who might have been interested in the property suffered no loss by its destruction. *Ib.*

4. *Same. Other insurance.*

In such case it is not a defense that other persons having an interest in the property had taken out further insurance. *Ib.*

5. *Same. False statements.*

Statements of the insured relative to other insurance relate only to insurance taken by him where there is no inquiry concerning insurance by others. *Ib.*

6. *Same. Special interest.*

The insured whose interest in the destroyed property was special can sue for whatever interest he owned and for the amount due other owners, which amount, when recovered, will be held by him in trust for such owners. *Ib.*

INSURANCE, LIFE.

Parol trust. Revocable trust. Contingency of death. Interest of beneficiary.

Where the insured in a life policy payable to himself, his administrators, executors or assigns, transfers the same to a third person as collateral security for a small loan, with directions that, in case anything should happen to him (construed to mean in case of his death) while the loan remained unpaid, such person should collect the policy, and, after deducting the amount of his loan, divide the

balance of the proceeds between the wife and child of the insured, a parol trust is created in favor of the wife and child, whereby they acquire an interest *in present*, and, on the death of the insured without revoking the trust, such interest becomes absolute as against his administrator, in a proceeding not involving the rights of creditors of the insured. *Hiserodt v. Hamlett*, 37.

INTEREST AND USURY.

1. *Code of 1880, § 1141. Code of 1892, § 2348.*

Under the code of 1880, § 1141, if a lender stipulated for interest in excess of ten per centum, the contract was usurious and all interest was forfeited. The code of 1892, § 2348, did not substantially change the law, by the provision that all interest shall be forfeited if the lender stipulates for or receives interest in excess of such rate; and so far as concerns the right of the lender to sue for and recover usurious interest paid, where the same was stipulated for in this state, the codes are substantially the same. *Bank v. Auze*, 609.

2. *Penalty. Statute of limitations. Code 1892, § 2741.*

A suit for the recovery of interest paid upon a usurious contract is not for the recovery of a penalty *eo nomine* within the statute (code 1892, § 2741), and is not barred thereby. *Ib.*

3. *Appropriation of payments.*

Before such a suit can be maintained, the borrower must extinguish the principal debt due the lender, and payments will be applied to such debt until it is satisfied. *Ib.*

4. *Security of loan. Mortgage on lands in another state.*

The execution of a mortgage on lands in another state, to secure a loan made in this state, does not make the contract one to be governed by the interest laws of such other state. *Ib.*

5. *Building and loan association. Withdrawal of member. Settlement.*

Where a borrowing member of a building and loan association withdraws from and makes a settlement with it, and is credited, as his share of the profits, with the unearned part of the premium bid by him and with a sum as dividend on his stock, including interest charged him and his fellow members, he cannot recover from the association, as usurious, interest charged on premiums; and he is bound by a settlement made by him which was voluntary and in which nothing was concealed from him. *Building & Loan Association v. Leonard*, 810.

INTERPLEADER.

1. *Code 1892, § 714.*

A defendant, when sued upon a contract made with the plaintiff for the price of timber cut from land, can, under code 1892, § 714, interplead a third person who claims ownership of the land and of the trees cut therefrom. *Boyle v. Mantun*, 572.

2. *Evidence. Title to land.*

In such case, the party interpleaded should be permitted to show title to the land from which the trees were cut, and that plaintiff had no title thereto. *Ib.*

INTOXICANTS.

See LIQUORS, SALE OF.

JUDGMENT AND DECREE.

1. *Judgment of justice of the peace. Sale of land thereunder. Filing transcript. Code 1880, § 2211; code 1892, § 3499.*

A sale of land under the judgment of a justice of the peace is invalid, where there is a failure to comply with the statute requiring a transcript of the proceeding in which it was rendered to be filed in the office of the clerk of the chancery court of the county in which the land lies. *Dunlap v. Fant*, 197.

2. *Jurisdiction. Attachment. Judgment in personam.*

A judgment for the debt in attachment should be set aside for want of jurisdiction when there has been no levy upon property or garnishment in the county where the action was brought, although an alias writ of attachment has been served upon the defendant, as a summons, in another county, where he resides. *Campbell v. Triplett*, 365.

3. *Wagering contracts. Judgment on note.*

A suit on a judgment rendered upon a note given for a gambling contract can be defeated by showing the illegality of the original transaction. *Campbell v. Bank*, 526.

4. *Same. Code 1880, § 990; code 1892, § 2114.*

Judgments on any wager whatever are void under the statute (code 1880, § 990; code 1892, § 2114), and money lost on any wager can be recovered back by the loser. *Ib.*

5. *Same. Futures.*

A contract for the payment of differences in prices, arising out of the rise and fall in the market price above or below the contract price, is a wager on the future price of the commodity, and is therefore invalid. *Ib.*

6. *Assignment for creditors. Judgment creditors. Costs and fees. Receiver. Code 1892, ch. 8.*

An assignee and receiver, under code 1892, ch. 8, where the assignment is made after the rendition and enrollment of a judgment against the assignor, is not, as against the judgment creditor, entitled to withhold commissions, costs and fees incurred in resisting such creditor's demand, out of the proceeds of the assigned property. *Pittman v. Hopkins*, 563.

7. *Criminal law. Justice of the peace. Judgment. Failure to enter.*

The failure of a justice of the peace, for the lapse of several days after a trial and conviction and the adjournment of his court, to enter judgment against the accused, being merely clerical, affords no ground for the offender's discharge. *Lunenberger v. State*, 379.

8. *Replevin. Alternate judgment. Code 1892, § 3726. Election.*

If a plaintiff in replevin recover, the judgment, under code 1892, § 3726, should be in the alternative, for the property or its value as found by the jury. The defendant in such case can elect to pay the value and retain the property. *Bond v. Griffin*, 599.

9. *Same. Plaintiff's interest. Instruction.*

If the testimony shows that plaintiff has only a limited interest in the property, an instruction announcing his right to recover should confine the right to the value of such interest. *Ib.*

10. *Railroad right of way. Superstructure. Decree confirming tax title.*

A decree confirming a tax title to land, made under the general law of taxation, and not under the special provisions of the code of 1880 for the taxation of railroads, over which a railroad company's right of way extends, and which decree removes all clouds from the title of the owner of the tax deed and adjudges it a perfect title and cancels all interest, claim or privilege of the railroad company to the land, carries the easement or right of way, even if the tax title thereto was invalid, but it does not carry the railroad company's track and superstructure. *Railroad Co. v. Le-Blanc*, 650.

11. *Tax title. Confirmation. Defendant's title.*

The complainant who seeks to confirm a tax title cannot recover because of any defects in the title of one whom he has made a de-

fendant to his suit; he must recover, if at all, on the validity of his own title. *Pollock v. Sykes*, 700.

12. *Res adjudicata*. Decree. Construction. Widow's year's allowance. Code, 1892, § 1877.

If, in a suit by the widow and sole heir of a decedent to have his will adjudged invalid, a consent decree be rendered adjudging the will void as to real estate, but valid as to personalty, and decreeing that the widow be paid a certain sum of the proceeds of the personalty, and that the balance of the personalty be paid by the executor to the legatee, "subject to all proper costs, allowances, and expenses," such decree will bar an application by the widow for a year's support, under code 1892, § 1877. *Blackbourn v. Senatobia Educational Assn.*, 852.

13. *Justice of the peace*. Criminal practice. Entry of judgment.

If a justice of the peace tries a criminal case, of which he has jurisdiction, and enters his judgment on a loose piece of paper, and, after his court adjourns, transfers the entry to his docket, the judgment is not invalid. *Holley v. State*, 878.

JUDICIAL SALES.

See SALE.

JURISDICTION.

OF SUPREME COURT.

1. *Appeal*. Constitution 1890, § 147.

If the chancery court overrules a demurrer to a bill in equity raising the question of its jurisdiction to subject specific property to the payment of a judgment at law, the record of which judgment has been destroyed, the supreme court cannot, under the constitution, § 147, review such question, there being no other error found in the record. *Day v. Hartman*, 489.

2. *Appeal*. Attachment for rent. Amount in controversy. Code 1892, § 85.

Upon an appeal to the supreme court from a judgment of the circuit court, in favor of a landlord, in an action of replevin by the tenant for property distrained for rent, begun in a justice's court, the amount in controversy is determined by the rent due, as adjudged by the circuit court, and not by the value of the property seized. *Biddle v. Patne*, 494.

OF CHANCERY COURT.

3. *Assignment for creditors. Assignee of receiver. Code 1892, §§ 117, 118, 119.*

Under §§ 117, 118, 119, code 1892, which provide that, within twenty-four hours after taking possession, the assignee, in every general assignment for the benefit of creditors where the value of the assigned property exceeds \$1,000, shall file his petition and bond in the chancery court, and, on the approval of the bond, shall be a receiver of the court, no jurisdiction over said property is acquired by said court until such petition is filed and bond approved, and, until then, creditors may attach the same in the hands of the assignee. *Wetmer v. Scales*, 1.

4. *Same. Assignment filed for record.*

The filing of a general assignment for creditors for record in the office of the clerk of the chancery court is not such a compliance by the assignee with §§ 117, 118, 119, code 1892, as will vest that court with jurisdiction over the assigned property. *Ib.*

5. *Same. Rights of attaching creditors.*

When the assignee in a general assignment has filed his petition together with a duly approved bond, under §§ 117 and 118, code 1892, the jurisdiction of the chancery court attaches to the assigned property, and that court will draw to it the determination of all controversies in which liens thereon are asserted, including attachments levied thereon. *Ib.*

6. *Nonresidents. Unliquidated demand.*

The chancery court has jurisdiction of a bill for relief filed against a nonresident of the state, having property here, to redress a wrong, even if the damages suffered by complainant are unliquidated. *Gordon v. Warfield*, 553.

OF CIRCUIT COURT.

7. *Attachment. Judgment in personam.*

A judgment for the debt in attachment should be set aside for want of jurisdiction when there has been no levy upon property or garnishment in the county where the action was brought, although an alias writ of attachment has been served upon the defendant, as a summons, in another county, where he resides. *Campbell v. Triplett*, 365.

8. *Same. Venue.*

The venue of actions *in personam* is "in the county in which the defendants, or any of them, may be found." *Ib.*

9. *Removal to federal court.*

The state court ceases to have jurisdiction of a cause upon the filing of a petition and bond for the removal of the case to the federal court, only when the petition and bond, taken in connection with the whole record, shows a case that is removable under the acts of congress. *Railroad Co. v. LeBlanc*, 626.

10. *Ejection. Constitution 1890, § 160.*

The circuit court has jurisdiction generally of an action of ejection, and is not deprived thereof by § 160 of the constitution of 1890. *Railroad Co. v. LeBlanc*, 650.

11. *Same. Constitution 1890, § 147.*

The circuit court having entertained jurisdiction of this case—an action of ejection—wherein plaintiff's title was proved by a tax deed and a decree of the chancery court confirming the same, this court is precluded, by § 147 of the constitution 1890, from reversing for want of jurisdiction. even if, by § 160 of the constitution, the remedy in the particular case should have been sought in the chancery court. *Ib.*

12. *Trespass. Citizenship. Location. Transitory action.*

It is no defense to a transitory action of trespass brought in this state that the wrong was done and injury inflicted in another state, and that both plaintiff and defendant, a foreign corporation, were, at the time, are now, and have been continuously since, residents and citizens of such other state. *Pullman Car Co. v. Lawrence*, 782.

13. *Foreign corporations. Jurisdiction. Code 1892, § 849.*

Under code 1892, § 849, foreign corporations may sue and be sued in this state as individual nonresidents may sue and be sued. *Ib.*

OF JUSTICE OF THE PEACE.

14. *Common carrier. Damage to freight. Shipper. Owners.*

Where a person ships freight, part of which belongs to him and parts to others, and the same is damaged by the negligence of the carrier, he may sue in tort in a justice's court for the injury to his own property, if the same does not exceed two hundred dollars, and that, too, though the entire shipment was made under one contract with him alone, and the damages to all the property exceed said sum; and, in such case, the fact that the plaintiff has brought separate suits, as agent for the other owners for their damages, will not defeat his individual case. *Waters v. Railroad Co.*, 534.

15. *Plea of not guilty. Waiver.*

If a justice of the peace has jurisdiction of the subject-matter of a criminal prosecution, the defendant waives the question of the jurisdiction of his person by pleading not guilty and going to trial. *Holley v. State*, 878.

See REMOVAL OF CAUSES.

JURY.

1. *Instruction. Juries not judges of the law.*

An instruction that the jury are "the exclusive judges of the evidence, its weight and effect," is ambiguous. If the word "effect" embraces legal effect, the instruction is wrong. *Tucker v. Tucker*, 93.

2. *Constitution of 1890. Jury laws enacted thereunder. Code 1892, § 2358.*

The constitution of 1890, and the jury laws enacted thereunder, are not obnoxious to the fourteenth amendment to the constitution of the United States because of discrimination on account of race, color or previous condition of servitude. *Gibson v. Mississippi*, 162 U. S. Repts., 565. *Dixon v. State*, 271.

3. *Same. Jurors. Payment of taxes.*

While it is essential, under the constitution of 1890, that a juror shall be a qualified elector, yet it is unnecessary that he shall have produced satisfactory evidence of the payment of taxes to the officers holding an election; such payment may be proved before the court. *Ib.*

4. *Same. Grand jury. Objections. Code 1892, § 2375.*

Code 1892, § 2375, requires that objections to the qualifications of grand jurors must be made, if at all, before they are impaneled, and they cannot be raised afterwards. *Ib.*

JUSTICE OF THE PEACE.

1. *Judgment. Sale of land thereunder. Filing transcript. Code 1880, § 2211; code 1892, § 3499.*

A sale of land under the judgment of a justice of the peace is invalid, where there is a failure to comply with the statute requiring a transcript of the proceeding in which it was rendered to be filed in the office of the clerk of the chancery court of the county in which the land lies. *Dunlap v. Fant*, 197.

2. *Certiorari. Practice. Code 1892, § 89.*

Under § 89, code 1892, upon certiorari from the judgment of a justice of the peace, the circuit court, finding error in the record, should

award a trial *de novo*, unless it be apparent of record what final judgment, as an entirety, the justice's court should have rendered. *Evans v. Railway Co.*, 230.

3. *Same. Value of property not appearing.*

In such case, the justice's record showing a judgment for the plaintiff by default in an action of trespass to property, and not showing the value of the property, upon reversal, a trial *de novo* should have been awarded. *Ib.*

4. *Same. Process. Amendment of return.*

In such case, the return of the officer upon a summons may be amended in the circuit court after reversal of the justice's judgment. *Ib.*

5. *Criminal law. Judgment. Failure to enter.*

The failure of a justice of the peace, for the lapse of several days after a trial and conviction and the adjournment of his court, to enter judgment against the accused, being merely clerical, affords no ground for the offender's discharge. *Lunenberg v. State*, 379.

6. *Criminal law. Entry of judgment.*

If a justice of the peace tries a criminal case, of which he has jurisdiction, and enters his judgment on a loose piece of paper, and, after his court adjourns, transfers the entry to his docket, the judgment is not invalid. *Holley v. State*, 878.

7. *Same. Transfer of cause. Another justice.*

If an affidavit is made before a mayor, charging defendant with a misdemeanor, and the mayor transfers the affidavit and the prisoner to a justice of the peace, who tries the defendant and convicts him, without objection to the latter's jurisdiction, the defendant cannot, upon appeal to the circuit court from such conviction, dismiss the prosecution because of irregularity in the transfer, or the want of an order on the mayor's docket making it. *Ib.*

8. *Same. Jurisdiction.*

If a justice of the peace has jurisdiction of the subject-matter of a criminal prosecution, the defendant waives the question of the jurisdiction of his person by pleading not guilty and going to trial. *Ib.*

LAND.

See LICENSE, STATE LANDS.

LANDLORD AND TENANT.

1. *Same. Penalty for failure to maintain crossing. Recovery by tenant. Expiration of lease pending suit.*

The right of the lessee of a farm, as "the person interested," to recover of a railway company the penalty prescribed by § 3561, code 1892, for its failure, during his tenancy, to maintain a crossing for a necessary plantation road, is not impaired by the fact that, pending suit, he has ceased to have any interest in the premises, as tenant or otherwise. *Railway Co. v. Ligon*, 176.

2. *Fixtures. Cotton gin.*

If a tenant buys and puts a cotton gin, condenser and feeder upon the leased premises, with the intention of removing them, they do not become fixtures so as to belong to the landlord as against the vendee of the tenant who purchases during the lease. *Tate v. Blackburne*, 48 Miss., 1, and *Jennings v. Wilson*, 71 Miss., 42, distinguished. *McMuth v. Levy*, 450.

3. *Same. General doctrine. Exceptions.*

To the general doctrine in relation to fixtures made by one upon the premises of another, there are generous exceptions in favor of trade, manufactures and tenants. *Ib.*

LARCENY.

1. *Criminal law. Ownership of property. Insufficiency of affidavit. Motion in arrest of judgment.*

An affidavit charging the larceny of cotton from affiant's premises, shown to be a farm, is insufficient, if it contains no averment that the cotton was the property of another than the accused; and the defect being one of substance, may be availed of in arrest of judgment. *Hughes v. State*, 368.

2. *Criminal law. Promissory note. Value of same. Code 1892, § 1176.*

Under § 1176, code 1892, providing that "if any person shall steal any . . . note . . . the money due thereon, . . . shall be deemed the value of the article stolen, without further proof," it is not error upon the trial of one charged with the larceny of a promissory note, to exclude evidence offered to show that the paper was uncollectible by reason of the insolvency of the makers and their refusal to pay, and therefore worthless, or at least under the value of twenty-five dollars. *McDowell v. State*, 373.

LEVEES.

1. *Eminent domain. Damages. Land left outside a levee. Constitution 1890, § 238.*

On a condemnation of land for levee purposes, the owner is not entitled, under § 238, constitution 1890, to damages because a part of his land is left outside of the levee; but is entitled to damage caused by the levee itself, such as the obstruction of drainage on land so situate. *Duncan v. Levee Commissioners*, 125.

2. *Practice. Land taken for levee purposes. Ejectment not available. Statutory remedy exclusive. Act February 7, 1894 (Laws, p. 95).*

Ejectment does not lie for land taken for levee purposes by the Board of Levee Commissioners for the Yazoo-Mississippi Delta, even when compensation has not preceded the taking, since the act of February 7, 1894 (Laws, p. 95), provides an exclusive remedy of a different nature. *Owens v. Levee Commissioners*, 269.

3. *Levee taxes. Lands outside of levee not liable. Laws of 1858, p. 32; laws of 1867, p. 237; laws of 1871, p. 57; laws of 1888, p. 40, construed.*

Lands lying between the Mississippi river and the levees built for protection against the waters thereof are not, under any law of this state, subject to taxes imposed for the construction of such levees or to meet liabilities incurred therein. *Owens v. Railroad Co.*, 821.

See TAX TITLES.

LICENSE.

1. *Parol agreement to convey land.*

A verbal agreement by the owner to convey land to a county for school purposes, by which third parties are induced to erect a schoolhouse thereon, is an irrevocable license for the purpose for which it was made, as long as the house is used for the purpose specified. *Agnew v. Jones*, 347.

2. *Same. In whose favor license good. Trespass.*

A license to use land is good only to those in whose favor and for whose use it is given. Every entry upon the land of another without lawful authority is a trespass, whether the land be inclosed or not, and whether appreciable damage be done or not. *Id.*

3. *Same. Entry to take one's own personality.*

It is a trespass to enter the land of another, without his consent, to take one's own personal property. *Id.*

4. *Statute of frauds. Standing timber.*

A parol agreement authorizing the cutting of standing timber on lands, is within the statute of frauds. *Walton v. Lowrey*, 484.

5. *Revocation.*

A sale of growing timber by parol is a license, and authorizes an entry upon the land, but the same is revocable at the will of the seller. *Ib.*

LIEN.

LIENS, AGRICULTURAL.

1. *Employee's lien. Agricultural products. Purchaser. Notice. Code 1892, § 2682.*

The lien of an employe, given by § 2682, code 1892, may be enforced against a purchaser of agricultural products, whether he buys with or without notice. *Powell v. Smith*, 142.

2. *Same. Employee's consent. Burden of proof.*

In an action by an employe against a purchaser of crops, the burden of proof is not on the plaintiff to show that he did not consent to the sale. (*Warren v. Jones*, 70 Miss., 202, explained.) *Ib.*

3. *Same. Overseer or manager.*

An overseer or manager of a farm, who aids by his labor to make, gather, or prepare for sale or market a crop, has a lien thereon for his wages. *Ib.*

4. *Same. Waiver. Note for wages.*

The taking of a promissory note for such wages is not necessarily a waiver of the lien; the question of waiver is one of fact, and the intention of the employe in taking the note may be the subject of evidence, but a direct agreement is not necessary to a waiver. *Ib.*

5. *Landlord's lien. Code 1892, §§ 2493, 1183, 2682.*

The statutory lien on crops given a landlord by § 2493, code 1892, and those given employers and employes by § 2682, code 1892, are co-extensive and reciprocal. *Ib.*

LIEN, ATTACHMENT.

6. *Husband and wife. Conveyances between. Acknowledgment. Notice. Code 1892, § 2294.*

Under § 2294, code 1892, providing that conveyances between husband and wife shall be invalid as against third persons, unless

acknowledged and recorded, an unacknowledged deed from a husband to his wife is invalid as against the attaching creditors of the husband, although recorded, and such creditors, prior to attaching, had actual notice of the conveyance and of its contents as they appeared of record. Citing *Montgomery v. Scott*, 61 Miss., 409. *Snider v. Udell Woodenware Co.*, 353.

LIEN, CREDITOR'S BILL.

7. *Practice. Filing of papers.*

Although marked filed, a paper is not filed, in the legal sense, until it has been delivered to the proper officer with the purpose that the usual steps shall be taken in reference thereto. *Bank v. Hoyt Bros. & Co.*, 221.

8. *Same. Chancery court. Creditor's bill. Case.*

When the solicitor of the complainant in a creditor's bill hands the same, together with the exhibits contained under the same cover, to the clerk of the chancery court and causes him to mark the bill filed, and, after making a corresponding entry on his general docket, to inclose the same in a regular court wrapper, and thereupon tells the clerk, without giving any reason therefor, that he did not wish process to be immediately issued and desired to take the papers back to his office, and, in fact, then carried the papers away with him, the clerk charging him with them and refraining from issuing process, there has been no such filing of the bill, in legal contemplation, as will entitle the complainant to priority of lien, under § 503, code 1892, over another attacking creditor who, in the interval of several days preceding the return of the papers and issuance of process, has, after learning the above facts, filed a like bill and had process issued thereon. *Ib.*

LIEN, OF VENDOR.

9. *Vendor and vendee.*

There exists no vendor's lien in favor of a complainant (as distinguished from a lien reserved by contract) when it appears that the note sued on was the price of the land sought to be subjected and certain personalty in gross, or that the land was sold for one sum and the personalty for another, the latter being evidenced by said note, for in neither case is there a fixed sum due from the vendee to the vendor as the purchase money of the land. *Griffin v. Byrd*, 32.

LIFE INSURANCE.

See INSURANCE, LIFE.

LIMITATIONS.

1. *Absence from state. Visits of travelling salesman.*

The visits to this state made in the course of his business by a traveling salesman who has removed to another state, during which he travels from place to place, spending only a day or two in each, cannot be included in the period necessary to bar by limitation a cause of action that accrued prior to his removal from this state, although, during each of said visits, he remained in the state continuously for several months. *Welle v. Levy*, 34.

2. *Attorney and client.*

An attorney at law is liable for any breach of duty under his contract of employment; and, such liability attaching immediately upon the breach, the statute of limitations ordinarily begins to run from the breach. *Hudson v. Kimbrough*, 341.

3. *Same. Trust.*

While the relationship of attorney and client, where the employment extends only to the collection of a single claim, is, in a limited sense, one of trust, yet it is not such an express and continuing trust as will take the client's cause of action out of the operation of the statute of limitations. *Ib.*

4. *Same. Concealed fraud. Code 1880, § 2679.*

The client's action against his attorney for breach of contract of employment, must, in case of fraudulent concealment of the cause of action, be begun, as provided by § 2679, code 1880, within the prescribed period after the discovery of the cause of action, or from the time when reasonable diligence would have led to its discovery. *Ib.*

5. *Usury. Penalty. Code 1892, § 2741.*

A suit for the recovery of interest paid upon a usurious contract, is not for the recovery of a penalty *eo nomine* within the statute (code 1892, § 2741), and is not barred thereby. *Bank v. Auze*, 609.

6. *Mortgages. Equity of redemption. Code 1892, § 2732.*

A mortgagor who permits the mortgagee, or those holding under him, to remain in possession of the mortgaged land for more than ten years after breach of condition, is, under code 1892, § 2733 (code 1880, § 2666), barred of all equity of redemption. *Tuteur v. Brown*, 774.

7. *Same. Cloud on title. Parties.*

A mortgagor who, by limitation, is barred of all equity of redemption, and who has conveyed all interest in the land, is neither a necessary or proper party to a bill to remove clouds from title. *Ib.*

LIMITATION OF ESTATES.

1. *Deed. Life estate. "Convey and warrant." Code 1892, § 2479.*

Under § 2479, code 1892, the words "convey and warrant" are effective "to transfer all the right, title, claim and possession" of the grantor only when an intention to convey a less estate is not expressed in the deed. *Hart v. Gardner*, 153.

2. *Same. Construction.*

The proper end of all rules of construction is to effect the intention of the parties to the instrument, and this is true of deeds as well as of other writings. *Ib.*

3. *Wills. Devise to heir at law. Common law rule. When inapplicable.*

The rule of the common law that a devise is void whenever the heir at law would take thereunder the same estate in quality that he would otherwise take by descent, is invoked to no purpose when the will contains other provisions with which its application does not consist. *Dunlap v. Fant*, 197.

4. *Same. Estate for life. Vested remainder. Defeasance.*

When, by the terms of his will, a testator, who has several children, devises his real estate to his wife for life, with remainder over at her death to such of his lawful heirs as may then be alive, and the children of such as may have died, *per stirpes*, and directs that the property shall not be divided or disposed of until one of his daughters attains her majority or marries, the children of the testator take, by purchase, vested remainders, subject to defeasance by their deaths during the continuance of the life estate, and the descendants of such of them as have died during the same time also take by purchase as ulterior limittees, and not as heirs of the testator. *Ib.*

5. *Same. Sale under execution. Right of purchaser. Defeasance of remainderman's interest.*

When a vested remainder is defeated by the death of the remainderman during the continuance of the particular estate, his judgment creditor has acquired nothing by a previous purchase of his interest at execution sale. *Ib.*

 LIQUORS, SALE OF.
1. *Misdemeanor. Aiding or assisting.*

Every person who aids in the commission of a misdemeanor is a principal. *Wiley v. State*, 727.

2. *Same. Selling intoxicating liquors.*

A party to the illegal sale of intoxicating liquors, though he be acting for another in making the sale, is guilty of the illegal sale. *Ib.*

3. *Distinct sales. Instruction.*

It is error, upon the trial of a defendant for the unlawful sale of intoxicating liquor, to admit evidence of more than one sale, and, if such evidence is admitted without objection, it is error to give an instruction for the state which ignores the rule in such cases that the conviction must be predicated of one sale. *Hyman v. State*, 829.

LIS PENDENS.

Notice. Purchaser of timber.

The pendency of a suit concerning lands is notice to the purchaser of the timber thereon, from a party to the suit, of the rights of complainant; and such notice, before the code of 1892 became operative, was effected by the mere pendency of the suit. *Trust Co. v. Hardwood Co.*, 584.

MALICE.

1. *Indictment. Motion in arrest. Code 1892, § 1341.*

Notwithstanding the provisions of code 1892, §§ 1341, 1354, a judgment in a felony case should be arrested if the indictment be so defective that the nature and cause of the accusation is not clearly and fully stated. *Cook v. State*, 72 Miss., 517, cited. *Taylor v. State*, 544.

2. *Same.*

All indictments for felony must contain the averment that the act was committed with malice aforethought, or equivalent words, otherwise the defect is fatal. *Maxwell v. State*, 68 Miss., 339; *Jesse v. State*, 28 Miss., 100, cited. *Ib.*

3. *Same. Code 1892, § 1255.*

An indictment, under code 1892, § 1255, which fails to aver that the poison was mingled with intent maliciously to kill, etc., is defective. Malice must be charged of the intent to kill, etc. *Ib.*

MASTER AND SERVANT.

Railroads. Trespasser. Wilful injury by employe. Flagman.

A railway company is liable in damages for injuries wilfully inflicted by its employe, a flagman, upon a trespasser by violently ejecting him from a rapidly moving train, when it appears in evidence that it was the duty of the employe to carry trespassers to the conductor, and, if he authorized it, to have the train stopped and put them off. *Railroad Co. v. Latham*, 72 Miss., 32, and *Williams v. Railroad Co.*, 19 So. Rep., 90, distinguished. *Railway Co. v. Hunter*, 444.

MORTGAGE AND DEED OF TRUST.

1. *Rights of beneficiary. Precarious security. Case.*

The beneficiary in a deed of trust upon property subject to prior liens, that affords but a precarious security for his debt, and is all that the debtor owns, is entitled to have a receiver appointed of the rents and profits to the same extent as if his incumbrance were a mortgage; and it is error to discharge a receiver, on defendant's motion, before final hearing, when the evidence adduced shows such a state of case. *McDonald v. Vinson*, 56 Miss., 497, cited. *Pearson v. Kendrick*, 235.

2. *Assignment. Bona fide holder.*

If the holder of a deed of trust indorses the same, and the note secured by it, and permits the possession of the instruments to pass, and the indorsee transfers the same for value to an innocent third party, the latter will acquire title thereto superior to any undisclosed equity in the original indorser. *Gross v. Oatis*, 357.

3. *Same. Junior incumbrancer.*

The owner of a prior deed of trust on personal property to secure a sum greater than the value of the property, may acquire the property from the grantor in his deed freed from a junior lien on the same property. *Ib.*

4. *Same. Innocent purchaser. Extent of right.*

If a purchaser be a *bona fide* one for value, he is entitled not alone to be saved harmless to the extent of his money paid, but should be protected in the fruits of his bargain. *Ib.*

5. *Eminent domain. Laws of 1884, p. 166. Mortgagee.*

Whether a mortgagee be, or be not, a proper party to a condemnation proceeding, a payment by the levee board, with full knowledge of the mortgage, to the mortgagor of the damages awarded,

will not, under laws 1884, p. 166, preclude a suit therefor by the mortgagee. *Levee Board v. Wilborn*, 396.

6. *Foreclosure. Defense.*

In a suit to foreclose a mortgage, if the mortgagee makes out a *prima facie* case not disclosing fraud, the mortgagor cannot successfully defend by showing that the deed was executed to defraud his creditors, and that the mortgagee was a party to the fraud. *Barwick v. Moyse*, 415.

7. *Fraudulent conveyance. Good between parties.*

Though a mortgage be executed with intent to defraud the creditors of the mortgagor, it is nevertheless good between the parties. *Ib.*

8. *Same. Security of loan. Mortgage on lands in another state.*

The execution of a mortgage on lands in another state, to secure a loan made in this state, does not make the contract one to be governed by the interest laws of such other state. *Bank v. Auzo*, 609.

9. *Trustee. Appointment of substitute.*

Unless specially authorized by the terms of the instrument, a trustee in a deed of trust is unauthorized to appoint another to act in his place. *Carey v. Fulmer*, 729.

10. *Same. Abandonment of trust. Equity jurisdiction.*

If a trustee in a deed of trust abandons the trust, a court of equity may enforce the trust at the suit of the beneficiary. *Ib.*

11. *Same. Effort to sell for more than was due. Injunction.*

If an effort be made under a deed of trust to sell the property for largely more than the sum due, an injunction may properly be issued. *Ib.*

12. *Chancery practice. Amendment.*

In a suit to enjoin a sale under a deed of trust, on the ground that nothing was due when the deed was executed and that it was obtained by fraud, where defendants filed a cross bill to enforce the deed, it is error not to allow complainants to amend the bill so as to show that the debt claimed by the holder of the deed was made up of usury and other improper charges. *Ib.*

13. *Equity of redemption. Limitation. Code 1892, § 2732.*

A mortgagor who permits the mortgagee, or those holding under him, to remain in possession of the mortgaged land for more than ten years after breach of condition, is, under code 1892, § 2732 (code 1880, § 2666), barred of all equity of redemption. *Tutcur v. Brown*, 774.

14. *Same. Cloud on title. Parties.*

A mortgagor who, by limitation, is barred of all equity of redemption, and who has conveyed all interest in the land, is neither a necessary or proper party to a bill to remove clouds from title. *Ib.*

15. *Right of mortgagor. Consumptive use. Fraud on creditors.*

A mortgage, executed by a manufacturing company on its products, wherein is reserved to the mortgagor the right to keep, use and sell them in the usual course of business, is fraudulent as to the creditors of the mortgagor. *Bank v. Caperton*, 857.

16. *Same. Right of mortgagee. Seizure.*

Such a mortgage is not rendered valid by a provision that in case the mortgagor should sell the property, or any interest therein, that the mortgagee should take immediate possession for the purposes of the mortgage. *Ib.*

17. *Pledge. Possession.*

Possession of the property and good faith on the part of the pledgee are both necessary to constitute a valid pledge as against the rights of creditors of the pledgor. *Ib.*

18. *Bill to redeem. Tender.*

If the object of a bill in equity be to redeem, and not to cancel a mortgage, a previous tender of the sum due is unnecessary, where complainant is unable to know, because of defendant's fault, what sum is due upon the mortgage debt. *Mortgage Co. v. Jefferson*, 69 Miss., 464, distinguished. *Aust v. Rosenbaum*, 893.

MUNICIPALITY.

1. *Ordinance. Construction. Surplusage.*

A municipal ordinance fixing in its first section a rate of taxation on all property, except banks and solvent credits, and by its second section fixing a lower rate on banks and solvent credits, cannot be held to impose the greater rate on banks. The exception in the first section and the second section cannot be treated as surplusage. *Adams v. Bank*, 307.

2. *Same. Municipal taxes. Variant rates.*

If a municipality be without power to impose a lesser rate of taxation on a class of property than that imposed on property generally, and yet attempts to do so by ordinance, if the ordinance be not wholly void, the aggrieved parties are those upon whose property the greater burden was sought to be imposed. *Ib.*

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3. *Taxation. Levy. Payment.*

A levy of a tax is indispensable to create a legal obligation to pay it. A taxpayer who has paid all taxes undertaken to be imposed upon his property, is not in default for not having paid more thereon. *Ib.*

4. *Defective street. Liability. Notice.*

A municipality is liable for an injury suffered by the occupant of a carriage because of defects in its street of which it had due notice. *City of Natchez v. Shields*, 871.

MURDER.

See HOMICIDE.

NEGLIGENCE.

1. *Railroads. Engineer. Knowledge of defects, etc. Switches.*

An engineer who has knowledge of the incompetency of his fireman, and of defects in his engine, is thereby required to use greater care, in approaching stations with switches, to keep his train under control, to avoid accidents. *Railroad Co. v. Guess*, 170.

2. *Same. Contributory negligence.*

If, in approaching a station, an engineer fails to exercise ordinary prudence, and is injured because of such failure, he cannot recover of the company because of its negligence in not equipping the train with air brakes and the engine with a proper headlight, and in having an incompetent fireman in its service. *Ib.*

3. *Same. Rules of company.*

The rule of the company, known to the engineer, that a switch signal imperfectly displayed, or the absence of a signal at its usual place, must be regarded as a danger signal, is binding on an engineer, and if he be injured because of a failure to observe the rule he cannot recover from the company. *Ib.*

4. *Same. Section 193, constitution of 1890; code 1892, § 3559, as amended (Laws 1886, p. 97).*

Engineers and conductors in charge of dangerous or unsafe cars or engines, voluntarily operated by them, are excepted from the rule (sec. 193, constitution, and § 3559, code 1892, as amended by act of 1896). that knowledge by an employe of the defective or unsafe character or condition of machinery or appliances, shall be no defense to an action for an injury caused thereby. *Ib.*

5. *Railroads. Live stock on track. Stock law district. Code 1892, § 1808.*

Though live stock may, in a stock law district, be wrongfully at large and trespassing on a railroad track, yet, under § 1808, code 1892, the railroad company is *prima facie* liable to the owner for injury to an animal inflicted by the running of its locomotives or cars. *Roberds v. Railroad Co.*, 334.

6. *Same. Peremptory instruction.*

Where an animal is killed or injured by the running of railroad locomotives or cars, even if the animal were unlawfully at large and trespassing on the track, yet a peremptory instruction for defendant should not be given if there be evidence showing, or tending to show, that the injury might have been avoided by the exercise of reasonable care after the animal was seen by defendant's servants in charge of the train. *Ib.*

7. *Railroads. Live stock near track. Duty of engineer, etc.*

It is not the duty of the engineer of a railroad train, upon seeing live stock near the track, to stop the train or check its speed, unless there is an apparent necessity for so doing, and, ordinarily, the discovery of an animal near the track does not create such necessity. *Railroad Co. v. Whittington*, 410.

8. *Same.*

An engineer is not bound to anticipate that a horse drinking at a pond would run up a bank ten or twelve feet high, in front of a moving train. *Ib.*

9. *Fire. Damages.*

The setting out of fire on one's own land may be, and is, under some circumstances, sufficient proof of negligence to entitle the owner of adjoining lands to recover damages caused by the spread of the fire. *Railroad Co. v. Stinson*, 453.

10. *Same. Contributory negligence.*

One who uses his land in a natural and ordinary way, for purposes to which it is suited, is not required to anticipate negligence by a railway company whose track is adjacent, and his failure to so manage his business as to protect his property from loss against such negligence, is not contributory negligence on his part. *Ib.*

11. *Railroad. Live stock on track; when no liability for damage to.*

If, in a suit against a railroad company for injury to live stock on its track, caused by the running of its train, the servants of the company used every reasonable effort to prevent the injury, the plaintiff is not entitled to a recovery. *Railroad Co. v. Weems*, 513.

12. *Railroads. Injury to animal. Wire fence. Right of way.*

If a horse is frightened by a train and runs into a place rendered dangerous by the proximity of a wire fence, erected by the company's consent on the right of way, and a bluff of the cut in which the railroad is laid, and the danger is known to the engineer in charge of the train, and he can do anything which would save the animal from its peril and fails to do it, the company is liable for injuries to the horse resulting from contact with the fence. *Railroad Co. v. Lambuth*, 758.

NOTES.

See *BILLS AND NOTES*.

NOTICE.

1. *Deed of trust. Assignment. Bona fide holder.*

If the holder of a deed of trust indorses the same, and the note secured by it, and permits the possession of the instruments to pass, and the indorsee transfers the same for value to an innocent third party, the latter will acquire title thereto superior to any undisclosed equity in the original indorser. *Gross v. Oatts*, 357.

2. *Eminent domain. Laws of 1884, p: 166. Mortgagee.*

Whether a mortgagee be, or be not, a proper party to a condemnation proceeding, a payment by the levee board, with full knowledge of the mortgage, to the mortgagor of the damages awarded, will not, under laws 1884, p. 166, preclude a suit therefor by the mortgagee. *Levee Board v. Wiborn*, 396.

3. *Record of deed. Purchaser of timber.*

A person who buys standing timber, even if the seller be in possession, is bound to take notice of a deed from the seller then recorded, conveying the land to another without reservation of the timber. *Trust Co. v. Hardwood Co.*, 584.

4. *Same. Lis pendens.*

The pendency of a suit concerning lands is notice to the purchaser of the timber thereon, from a party to the suit, of the rights of complainant; and such notice, before the code of 1892 became operative, was effected by the mere pendency of the suit. *Ib.*

5. *Constructive notice. Deed. Trust deed. Record.*

Where a purchaser of land fails to record his deed, but the vendor duly records a deed of trust, given by the purchaser to secure the purchase money, the record of the latter is constructive notice to the trustee and beneficiaries therein of the rights of the purchaser. *Stovall v. Judah*, 747.

6. *Same. Occupation. Unrecorded deed.*

The open, exclusive and continuous occupation of land, under an unrecorded deed, is constructive notice to creditors and subsequent purchasers of the occupant's rights. *Id.*

ORDINANCE.

See MUNICIPALITY.

OVERSEER.

See LIEN, AGRICULTURAL.

PASSENGER.

See RAILROADS, SLEEPING CAR.

PATENT.

1. *Land commissioner. Book of entries of issuance. Copies therefrom primary evidence. Code 1892, § 1784.*

Under § 1784, code 1892, certified copies from the book of entries in the office of the land commissioner of the state, showing the issuance of patents, are primary evidence, and admissible in the same manner and with the same effect as the original patent. *Boddie v. Pardee*, 13.

2. *Same. Sale by state. Irregularities. Laws 1878, p. 218.*

The validity of the state's patent to lands acquired under act of congress, September 4, 1841, which is made under laws of 1878, p. 218, cannot be questioned by one who does not claim under the United States or this state. *Godwin v. Davis*, 742.

PAYMENT.

1. *Agreement to accept lesser sum than debt in satisfaction.*

The acceptance from the maker by the payee of a note, of a sum less than the amount due, with an agreement that it is received as full satisfaction, accompanied by the surrender of the note, extinguishes the entire debt. *Jones v. Perkins*, 29 Miss., 139; *Pulliam v. Taylor*, 50 Miss., 251, in so far as they announce the contrary, and *Burrus v. Gordon*, 57 Miss., 93, overruled. *Clayton v. Clark*, 499.

2. *Appropriation of payments.*

Before a suit to recover usurious interest paid can be maintained, the borrower must extinguish the principal debt due the lender, and payments will be applied to such debt until it is satisfied. *Bank v. Auze*, 609.

PENALTY.

Usury. Statute of limitations. Code 1892, § 2741.

A suit for the recovery of interest paid upon a usurious contract, is not for the recovery of a penalty *eo nomine* within the statute (code 1892, § 2741), and is not barred thereby. *Bank v. Auze*, 609.

See PRIVILEGE TAX.

PEREMPTORY INSTRUCTION.

See INSTRUCTION.

PLEADING.

1. *County warrants judgments. General issue nul tiel record. Limitation upon rule. Code 1871, § 1382.*

Nul tiel record is the only proper plea of the general issue to a demand based upon valid and duly registered county warrants issued prior to the enactment of § 1382, code 1871 (code 1880, § 2160; § 322, code 1892), there being no limitation upon the rule recognizing such warrants as judgments and exempting them from collateral attack prior to the enactment of said section. *Taylor v. Chickasaw County*, 23.

2. *Tax titles. Ambiguous description. Code 1880, § 491.*

Where the complainant, in a bill for the cancellation of a tax title, avers his ownership of a tract of land by a valid description and identifies it as the delinquent land assessed by an ambiguous description, and so sold and conveyed for taxes, and purchased by the defendant, the description in the assessment roll and tax deed is, by these averments, so applied to the particular tract as to call for no response in defendant's answer or the adduction of parol evidence, under § 491, code 1880, to apply the same thereto; and this effect of said averments is not obviated by complainants' use of the words "pretended sale" in referring to the sale for taxes. *Mixon v. Clevenger*, 67.

3. *Hilary rules. Not guilty.*

Hilary rules of pleading are not in force in this state, and a plea of not guilty in trespass does not admit possession; and it does not, in trespass *de bonis asportatis* or trover, admit plaintiff's title. *Trust Co. v. Hardwood Co.*, 584.

4. *Evidence. Demurrer. Practice.*

If a plea be held good by the court on demurrer, and the plaintiff has replied to the same traversing its averments, evidence of the

facts stated in the plea is admissible, and ought not to be excluded on the idea that if proved they do not constitute a defense. *Robertshaw v. Britton & Koonitz*, 873.

5. *Promissory note.* Code 1892, § 3503.

A plea that the note sued upon was executed upon the payee's promise to credit the amount upon another note for a larger sum previously executed, and which the payee represented he still held, but which he had, in fact, transferred, and that the larger note had been paid, presents a defense, under code 1892, § 3503. *Ib.*

PLEDGE.

Possession. Good faith.

Possession of the property and good faith on the part of the pledgee are both necessary to constitute a valid pledge as against the rights of creditors of the pledgor. *Bank v. Caperton*, 857.

PRACTICE.

IN SUPREME COURT.

1. *Appeal. Reversal. Jurisdiction. Dismissal of cause on appeal.*

On the reversal of a final decree in a cause of which the chancery court had no jurisdiction, the appellate court, instead of remanding the cause to the court having jurisdiction thereof, will dismiss the same when it appears from the evidence that the complainant has no cause of action. *Griffin v. Byrd*, 32.

2. *Premature action. Statutory penalty. Railroads. Farm-crossing.* Code 1892, § 3561.

An action for a second enforcement of a statutory penalty, on the ground of a continuance of the wrong, is premature when brought on the day of the disallowance, by the supreme court, of a suggestion of error to its judgment in a prior suit establishing plaintiff's right to the penalty, no reasonable time to repair the wrong being afforded the defendant. *Railway Co. v. Odeneal*, 827.

IN CHANCERY COURT.

3. *Filing of papers.*

Although marked filed, a paper is not filed, in the legal sense, until it has been delivered to the proper officer with the purpose that the usual steps shall be taken in reference thereto. *Bank v. Hoyt Bros. & Co.*, 221.

4. *Same. Creditor's bill. Case.*

When the solicitor of the complainant in a creditor's bill hands the same, together with the exhibits contained under the same cover,

to the clerk of the chancery court and causes him to mark the bill filed, and, after making a corresponding entry on his general docket, to inclose the same in a regular court wrapper, and thereupon tells the clerk, without giving any reason therefor, that he did not wish process to be immediately issued and desired to take the papers back to his office, and, in fact, then carried the papers away with him, the clerk charging him with them and refraining from issuing process, there has been no such filing of the bill, in legal contemplation, as will entitle the complainant to priority of lien, under § 503, code 1892, over another attacking creditor who, in the interval of several days preceding the return of the papers and issuance of process, has, after learning the above facts, filed a like bill and had process issued thereon. *Ib.*

5. *Illegal act. Demand connected therewith.*

The test whether a demand connected with an illegal act can be enforced, is whether the plaintiff requires any aid from the illegal transaction to establish his case. Citing *Gilliam v. Brown*, 43 Miss., 641. *Snyder v. Udell Woodenware Co.*, 353.

6. *Same. Case.*

A tenant in common who in the prosecution of a scheme to acquire the interests of her co-tenants causes her husband to buy the land for her sole benefit at tax sale, the conveyance being made to the husband, cannot, as against his attaching creditors, maintain a bill to enforce a resulting trust in the land on the ground that her money was used in the purchase. *Ib.*

7. *Tax title. Confirmation. Defendant's title.*

The complainant who seeks to confirm a tax title cannot recover because of any defects in the title of one whom he has made a defendant to his suit: he must recover, if at all, on the validity of his own title. *Gregory v. Brogan*, 694.

8. *General assignment. Personal decree.*

In case of a general assignment, administered under code 1892, ch. 8, creditors who file cross petitions, and establish their debts, are entitled to personal decree against the assignor, even if they fail in the attacks upon the validity of the assignment. *Pollock v. Sykes*, 700.

9. *Abandonment of trust. Equity jurisdiction.*

If a trustee in a deed of trust abandons the trust, a court of equity may enforce the trust at the suit of the beneficiary. *Carey v. Fulmer*, 729.

10. *Same. Effort to sell for more than was due. Infunction.*

If an effort be made, under a deed of trust, to sell the property for largely more than the sum due, an injunction may properly be issued. *Ib.*

11. *Amendment.*

In a suit to enjoin a sale under a deed of trust, on the ground that nothing was due when the deed was executed and that it was obtained by fraud, where defendants filed a cross bill to enforce the deed, it is error not to allow complainants to amend the bill so as to show that the debt claimed by the holder of the deed was made up of usury and other improper charges. *Ib.*

12. *Cloud on title. Parties.*

A mortgagor who, by limitation, is barred of all equity of redemption, and who has conveyed all interest in the land, is neither a necessary or proper party to a bill to remove clouds from title. *Tuteur v. Brown*, 774.

13. *Supplemental bill. Demurrer.*

Upon demurrer to bill in equity, the original bill and supplemental bills, if any be filed, should be treated as one pleading. *Aust v. Rosenbaum*, 893.

14. *Mortgage. Bill to redeem. Tender.*

If the object of a bill in equity be to redeem, and not to cancel a mortgage, a previous tender of the sum due is unnecessary, where complainant is unable to know, because of defendant's fault, what sum is due upon the mortgage debt. *Mortgage Co. v. Jefferson*, 69 Miss., 464, distinguished. *Ib.*

IN CIRCUIT COURT.

15. *Bills of exceptions. General and special.*

Bills of exceptions are of two kinds; general bills, which are taken to the action of the court on a motion for a new trial, and by which the whole case, or so much thereof as is desired, can be brought into review; and special bills, by which one or more specific rulings of the trial court are presented for review. *State v. Spengler*, 129.

16. *Same. General bills. Formal exceptions. Code 1892, § 739.*

The formality of excepting to the action of the trial court in passing upon a motion for a new trial is dispensed with by statute. Code 1892, § 739. *Ib.*

17. *Same. Authentication. When signature and certificate of judge unnecessary.*

Under the act of 1896 (Laws, p. 91), in cases where the evidence and proceedings are noted by an official stenographer, if the stenographer's notes be written out, and the parties, or their attorneys, agree, in writing, that the same is correct, such notes so written become part of the record without the approval or signature of the judge. *Ib.*

18. *Evidence. Exclusion by the court.*

It is error to exclude all the plaintiff's evidence, on motion of defendant, if the testimony of any witness makes out, or tends to make out, the case. *Ib.*

19. *Same. Motion to exclude reserved. No action by trial court.*

When the trial court reserves its decision on a motion to exclude a part of the testimony of one of plaintiff's witnesses, and afterwards excludes all the evidence offered in his behalf, the appellate court will not review the question so reserved. *Ib.*

20. *Evidence. Writings. Effect on collateral fact. Province of judge.*

To interpret the meaning of a writing unaffected by parol testimony is the province of the judge; but its effect as evidence of a collateral fact—as waiver—is for the jury. *Powell v. Smith*, 142.

21. *Criminal law. Indictment. Incompetent testimony before grand jury.*

An indictment should not be quashed because the grand jury heard incompetent testimony. *Hammond v. State*, 214.

22. *Same. Grand jurors as witnesses.*

Grand jurors are incompetent witnesses to prove upon what evidence an indictment was found. *Ib.*

23. *Certiorari. Justice of the peace. Code 1892, § 89.*

Under § 89, code 1892, upon certiorari from the judgment of a justice of the peace, the circuit court, finding error in the record, should award a trial *de novo*, unless it be apparent of record what final judgment, as an entirety, the justice's court should have rendered. *Evans v. Railway Co.*, 230.

24. *Same. Value of property not appearing.*

In such case, the justice's record showing a judgment for the plaintiff by default in an action of trespass to property, and not showing the value of the property, upon reversal, a trial *de novo* should have been awarded. *Ib.*

25. *Same. Process. Amendment of return.*

In such case, the return of the officer upon a summons may be amended in the circuit court after reversal of the justice's judgment. *Ib.*

26. *Land taken for levee purposes. Ejectment not available. Statutory remedy exclusive. Act February 7, 1894 (Laws, p. 95).*

Ejectment does not lie for land taken for levee purposes by the Board of Levee Commissioners for the Yazoo-Mississippi Delta, even when compensation has not preceded the taking, since the act of February 7, 1894 (Laws, p. 95), provides an exclusive remedy of a different nature. *Owens v. Levee Commissioners*, 269.

27. *Jurors. Payment of taxes.*

While it is essential, under the constitution of 1890, that a juror shall be a qualified elector, yet it is unnecessary that he shall have produced satisfactory evidence of the payment of taxes to the officers holding an election; such payment may be proved before the court. *Dixon v. State*, 271.

28. *Same. Grand jury. Objections. Code 1892, § 2375.*

Code 1892, § 2375, requires that objections to the qualifications of grand jurors must be made, if at all, before they are impaneled, and they cannot be raised afterwards. *Ib.*

29. *Arbitration and award. Irregularities of arbitrators. Code 1892, ch. 6.*

An award returned into the circuit court by arbitrators appointed under § 112, code 1892, should be vacated when it appears that after the submission of the case the arbitrators heard the unsworn testimony of one party, in the absence of and without the knowledge of the other or his counsel. *Rand, Johnson & Co. v. Peel*, 305.

30. *Same. Appeal from award. Procedure. Code 1892, ch. 6.*

On an appeal from an award returned into and approved by the circuit court under § 112, code 1892, the award is dealt with by the supreme court, in the matter of procedure, as having the same effect as a final judgment of the trial court, and, when set aside, the submission falls with it. *Ib.*

31. *Railroad. Section foreman. Scope of agency. Judicial knowledge.*

Where there is no dispute as to a railroad section foreman's agency, the court will take knowledge of the fact that it was his duty to keep both track and right of way in proper condition. *Railroad Co. v. Stinson*, 453.

32. *Bill of exceptions. Stenographer's notes. Agreement of attorneys. Laws 1896, pp. 91-93.*

Under the act of 1896 (Laws 1896, pp. 91-93) it is unnecessary that the agreement between attorneys, that the stenographer's notes of the evidence, as written out and filed, is correct, so as to dispense with the judge's signature to the bill of exceptions, shall be indorsed upon the paper so filed; it is sufficient if the agreement is made in writing and filed, even in the supreme court. *Sanders v. State*, 531.

33. *Same. Limit of time.*

The act of 1896, *supra*, does not fix any limit on the time within which such agreement shall be made, and it therefore can be made at any time before the appeal is barred. *Ib.*

34. *Peremptory instruction. Material evidence.*

A peremptory instruction for defendant ought not to be given at the close of the evidence because of the omission by plaintiff to prove material averments of the declaration, where the plaintiff contends that such facts were proved, and offers, if mistaken, to reintroduce a witness to establish them. *French v. Railroad Co.*, 542.

35. *Interpleader. Code 1892, § 714.*

A defendant, when sued upon a contract made with the plaintiff for the price of timber cut from land, can, under code 1892, § 714, interplead a third person who claims ownership of the land and of the trees cut therefrom. *Boyle v. Manion*, 572.

36. *Same. Evidence. Title to land.*

In such case, the party interpleaded should be permitted to show title to the land from which the trees were cut, and that plaintiff had no title thereto. *Ib.*

37. *Action. Premature institution. Statutory penalty. Railroads. Farm-crossing. Code 1892, § 3561.*

An action for a second enforcement of a statutory penalty, on the ground of a continuance of the wrong, is premature when brought on the day of the disallowance, by the supreme court, of a suggestion of error to its judgment in a prior suit establishing plaintiff's right to the penalty, no reasonable time to repair the wrong being afforded the defendant. *Railway Co. v. Odeneal*, 827.

IN JUSTICE OF THE PEACE COURTS.

38. *Attachment. Rent. Claimant. Notice. Code 1880, § 1318; Code 1892, § 2533.*

A claimant of goods attached for rent is to be treated, on the interposition of his claim, as a plaintiff in replevin, and should give

due attention to the prosecution of his suit, without notification thereunto. *Pierce v. Watkins*, 394.

39. *Same. Case.*

When his claim of goods attached for rent has been determined adversely to a claimant by a justice of the peace who was without jurisdiction, and, in consequence of his successful appeal to the circuit court, the papers are sent back and transferred for trial to a justice having jurisdiction, he is not entitled to be notified of the transfer. *Ib.*

PRINCIPAL AND AGENT.

1. *Principal and agent. Instructions.*

It is the duty of an agent to obey the instructions of his principal so long as the instructions are neither unlawful nor immoral. *Insurance Co. v. Wildberger*, 375.

2. *Same. Disobedience.*

If an agent enter upon a transaction in disobedience of his instructions, he cannot recover from his principal money paid out in such transaction. *Ib.*

3. *Insurance agent. Instructions.*

If an insurance agent, in violation of the instructions of his company, without being requested so to do by the policy holders, cancels policies issued by him, he cannot recover from the company the portions of premiums returned to the policy holders. *Ib.*

4. *Unilateral agreement. Nudum pactum.*

An agreement appointing an agent to sell land, the terms of which seek to bind only one of the parties thereto, is unilateral, and, until performance under it, without consideration. One may, at pleasure, ignore a nude promise. *Kolb v. Land Co.*, 567.

5. *Same. Land broker. Commissions.*

Such an agreement, where the owner himself sells the land before the agent finds a purchaser, cannot be made the basis of a suit by the agent for the commissions promised by its terms. *Ib.*

6. *Criminal law. Misdemeanor. Aiding or assisting.*

Every person who aids in the commission of a misdemeanor is a principal. *Wiley v. State*, 727.

7. *Same. Selling intoxicating liquors.*

A party to the illegal sale of intoxicating liquors, though he be acting for another in making the sale, is guilty of the illegal sale. *Ib.*

-8. *Tort by agent. Ratification by principal.*

If a defendant corporation be advised by one of its superior agents of a tort against a stranger committed by a subordinate agent, and strenuously endeavors to prove that the act of its subordinate agent was not tortious, and, when sued for the wrong, makes an unwarranted and violent attack on the conduct and character of the plaintiff, a verdict against it is justified on the ground of its having ratified the wrong. *Pullman Car Co. v. Lawrence*, 782.

9. *Special agent. Authority.*

A special commission to buy cotton at a designated place from certain persons is not an agency to buy at a different place from others. *Robinson Mercantile Co. v. Thompson & Co.*, 847.

10. *Same. Purchase. Equal quality and value.*

In such case it makes no difference that the cotton elsewhere purchased was of equal value and quality. *Ib.*

PRINCIPAL AND SURETY.

1. *Subrogation. Principal and surety. Creditor. Indemnity. Security.*

A security given by a principal to his surety, which is not conditioned to secure the debt, but merely to indemnify the surety, cannot be enforced by the creditor. *Clay v. Freeman*, 816.

2. *Same. Contingent liability.*

Even if the security in such case is conditioned to pay the debt if it provides for its enforcement only upon a certain contingency, it is a mere indemnity, and can be enforced only according to its stipulations. *Ib.*

PRIVILEGE TAX.

1. *Banks. Laws 1888, pp. 15, 16.*

Under the act of 1888 (Laws, pp. 15, 16), the payment of a proper privilege tax exempted a bank from *ad valorem* taxes. *Bank v. Adams*, 179.

2. *Same. Privilege tax.*

In case of suit on a fire insurance policy issued to a person having a reasonable expectation of pecuniary advantage from the preservation of the property, it is not a defense that other persons having an interest therein acquired their interest in the course of a business subject to a privilege tax due and unpaid. *Hope, etc., Co. v. Phoenix, etc., Co.*, 320.

3. *Store. Smokehouse. Code 1892, § 3390. Laws 1896, sec. 2, p. 50.*

The fact that merchandise kept for sale is so kept partly in a dwelling and partly in a smokehouse, does not exempt the owner from liability to a privilege tax upon a "store," under code 1892, § 3390 and laws 1896, sec. 2, p. 50. *Craig v. Pattison*, 881.

4. *Same. Landlord. Tenants. Farmer.*

A farmer who keeps merchandise at his farmhouse for sale at retail at a profit, though he sells only to his tenants, conducts a "store," and is liable to a privilege tax under the statute. *Ib.*

5. *Same. Evidence of value.*

If it be shown that goods were sold from a store, and that privilege tax was not paid thereon, and there be no evidence of the value of the stock, other than the value of the goods so sold, there can, under the statute, be no recovery for the goods, since a privilege tax of some amount is imposed upon all "stores." *Ib.*

PUBLIC LANDS.

See STATE LANDS.

RAILROADS.

1. *Engineer. Knowledge of defects, etc. Switches.*

An engineer who has knowledge of the incompetency of his fireman, and of defects in his engine, is thereby required to use greater care, in approaching stations with switches, to keep his train under control, to avoid accidents. *Railroad Co. v. Guess*, 170.

2. *Negligence. Contributory negligence.*

If, in approaching a station, an engineer fails to exercise ordinary prudence, and is injured because of such failure, he cannot recover of the company because of its negligence in not equipping the train with air brakes and the engine with a proper headlight, and in having an incompetent fireman in its service. *Ib.*

3. *Rules of company.*

The rule of the company, known to the engineer, that a switch signal imperfectly displayed, or the absence of a signal at its usual place, must be regarded as a danger signal, is binding on an engineer, and if he be injured because of a failure to observe the rule, he cannot recover from the company. *Ib.*

4. *Section 193, constitution of 1890; code 1892, § 3559, as amended (Laws 1886, p. 97).*

Engineers and conductors in charge of dangerous or unsafe cars or

engines, voluntarily operated by them, are excepted from the rule (sec. 193, constitution, and § 3559, code 1892, as amended by act of 1896), that knowledge by an employe of the defective or unsafe character or condition of machinery or appliances, shall be no defense to an action for an injury caused thereby. *Ib.*

5. *Farm crossing. Necessary plantation road. Code 1892, § 3561.*

A road connecting the dwelling house and the pasture land of a farm, through which a railway track runs, is a necessary plantation road within the meaning of § 3561, code 1892, when its disuse would involve any considerable inconvenience or expense to the tenant in possession, and a failure of the railway company to maintain a crossing for such road subjects it to the penalty of the statute, although there may be another crossing within the inclosed and cultivated land on the opposite side of the farm. *Railway Co. v. Ligon*, 176.

6. *Penalty for failure to maintain crossing. Recovery by tenant. Expiration of lease pending suit.*

The right of the lessee of a farm, as "the person interested," to recover of a railway company the penalty prescribed by § 3561, code 1892, for its failure, during his tenancy to maintain a crossing for a necessary plantation road, is not impaired by the fact that, pending suit, he has ceased to have any interest in the premises, as tenant or otherwise. *Ib.*

7. *Waters. Obstructions. Overflow. Former recovery.*

An action against a railway company for such damage as has resulted to the upper of two adjoining tracts of plaintiff's land from overflow, caused by an insufficient culvert and the erection of an embankment, is not barred by reason of his assignor's previous recovery of damages for the total destruction in value of the lower tract from the same cause. *Railroad Co. v. Wilbourn*, 284.

8. *Same. Peremptory instruction.*

It is the province of the jury to determine whether, or not, the injurious effects of the manner in which the natural flow of water has been obstructed by a railway company, are consistent with a due regard by such company for the rights of adjacent proprietors in the construction of its road. *Ib.*

9. *Same. Erroneous instruction.*

It is error, in an action for damages to plaintiff's lands resulting from an overflow, caused by an insufficient culvert and an embankment constructed by the defendant railroad company, to instruct the jury that the "plaintiff had the right to have the water,

whether rain water or spring water, flow as they naturally would have flowed without any obstruction by the railroad," for an interference with the natural flow of water incident to a proper construction and use of its roadbed, imposes no liability upon the defendant. *Ib.*

10. *Stock law. Landowner. Right of way. Not subject to fence tax. Act 1888, p. 118.*

A railway company is not, as to its rights of way, a landowner in the sense in which that term is employed in the Act of March 9, 1888 (Laws, p. 118), whereby boards of supervisors are authorized to levy a special tax on all landowners of any stock law district established thereunder. *Adams v. Railroad Co.*, 331.

11. *Live stock on track. Stock law district. Code 1892, § 1808.*

Though live stock may, in a stock law district, be wrongfully at large and trespassing on a railroad track, yet, under § 1808, code 1892, the railroad company is *prima facie* liable to the owner for injury to an animal inflicted by the running of its locomotives or cars. *Roberts v. Railroad Co.*, 334.

12. *Same. Peremptory instruction.*

Where an animal is killed or injured by the running of railroad locomotives or cars, even if the animal were unlawfully at large and trespassing on the track, yet a peremptory instruction for defendant should not be given if there be evidence showing, or tending to show, that the injury might have been avoided by the exercise of reasonable care after the animal was seen by defendant's servants in charge of the train. *Ib.*

13. *Evidence. Res gestæ. Agent. Declarations.*

The declaration of a railroad section foreman, who set out fire on the right of way of a railroad company, while the fire is yet burning, as to the origin of the fire, are admissible in evidence in an action against the railroad company for loss resulting from the fire, as part of the *res gestæ*. *Railroad Co. v. Stinson*, 453.

14. *Fire. Damages. Negligence.*

The setting out of fire on one's own land may be, and is, under some circumstances, sufficient proof of negligence to entitle the owner of adjoining lands to recover damages caused by the spread of the fire. *Ib.*

15. *Same. Contributory negligence.*

One who uses his land in a natural and ordinary way, for purposes to which it is suited, is not required to anticipate negligence by a railway company whose track is adjacent, and his failure to so
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manage his business as to protect his property from loss against such negligence, is not contributory negligence on his part. *Ib.*

16. *Section foreman. Scope of agency. Judicial knowledge.*

Where there is no dispute as to a railroad section foreman's agency, the court will take knowledge of the fact that it was his duty to keep both track and right of way in proper condition. *Ib.*

17. *Compromise. Offers. Statement of value.*

The fact that a plaintiff has offered to accept a sum of money in full settlement of damages for the destruction of his property by fire, and stated the property to be of such value, does not preclude him, on the rejection of the offer, from recovering such greater sum as the proof may warrant. *Ib.*

18. *Live stock near track. Duty of engineer, etc.*

It is not the duty of the engineer of a railroad train, upon seeing live stock near the track, to stop the train or check its speed, unless there is an apparent necessity for so doing, and, ordinarily, the discovery of an animal near the track does not create such necessity. *Railroad Co. v. Whittington*, 410.

19. *Same.*

An engineer is not bound to anticipate that a horse drinking at a pond would run up a bank ten or twelve feet high, in front of a moving train. *Ib.*

20. *Trespasser. Wilful injury by employe. Flagman.*

A railway company is liable in damages for injuries wilfully inflicted by its employe, a flagman, upon a trespasser by violently ejecting him from a rapidly moving train, when it appears in evidence that it was the duty of the employe to carry trespassers to the conductor, and, if he authorized it, to have the train stopped and put them off. *Railroad Co. v. Latham*, 72 Miss., 32, and *Williams v. Railroad Co.*, 19 So. Rep., 90, distinguished. *Railway Co. v. Hunter*, 444.

21. *Live stock on track; when no liability for damage to.*

If, in a suit against a railroad company for injury to live stock on its track, caused by the running of its train, the servants of the company used every reasonable effort to prevent the injury, the plaintiff is not entitled to a recovery. *Railroad Co. v. Weems*, 513.

22. *Passengers. Blind person.*

A common carrier of passengers cannot refuse to carry a person otherwise qualified, upon the sole ground that he is blind. *Zachery v. Railroad Co.*, 520.

23. *Damage to freight. Shipper. Owners. Justice's jurisdiction.*

Where a person ships freight, part of which belongs to him and parts to others, and the same is damaged by the negligence of the carrier, he may sue in tort in a justice's court for the injury to his own property, if the same does not exceed two hundred dollars, and that, too, though the entire shipment was made under one contract with him alone, and the damages to all the property exceed said sum; and, in such case, the fact that the plaintiff has brought separate suits, as agent for the other owners for their damages, will not defeat his individual case. *Waters v. Railroad Co.*, 534.

24. *Tort. Contract. Waiver. Parties.*

The owner of property damaged by a common carrier is a proper plaintiff in an action sounding in tort for the injury, even where the shipment was by and in the name of another. The contract may be waived and suit brought in tort for the gross or wilful negligence. *Ib.*

25. *Tax deed. Decree confirming. Ambiguity. Code 1892, § 3776.*

Under § 3776, code 1892, in an action of ejectment on a tax collector's deed and a decree confirming the same, wherein the land is described as "fractional thirty-eight acres" in a certain forty-acre tract assessed to a certain party, it is admissible to offer in evidence the assessment rolls, tax receipts and deeds which identify the remaining two acres, on which the taxes were paid, and thereby identify the land sold for taxes, and the description in the decree of confirmation may be thus aided as well as the tax deed. *Railroad Co. v. LeBlanc*, 650.

26. *Same. Railroad right of way. Superstructure. Decree confirming tax title.*

A decree confirming a tax title to land, made under the general law of taxation, and not under the special provisions of the code of 1880 for the taxation of railroads, over which a railroad company's right of way extends, and which decree removes all clouds from the title of the owner of the tax deed and adjudges it a perfect title and cancels all interest, claim or privilege of the railroad company to the land, carries the easement or right of way, even if the tax title thereto was invalid, but it does not carry the railroad company's track and superstructure. *Ib.*

27. *Ejectment for right of way.*

While ejectment can be maintained against a railroad company for the possession of its right of way, yet execution of such a judgment should be stayed for a reasonable time, to enable the company to institute and prosecute a condemnation proceeding to acquire a right to the way. *Ib.*

28. *Eminent domain. Improvements. Public purposes.*

The general rule that things affixed to the freehold by trespassers belong to the owner of the soil, is not applicable as against a body having the right of eminent domain and who has wrongfully entered and made improvements for the public purposes for which it was created and given the right. *Ib.*

29. *Exemplary damages. Highway. Street railroad.*

Exemplary damages are not recoverable by the owner of a lot against a street railroad company for the erection of a structure in a highway so near plaintiff's lot as to obstruct free passage, where no wanton conduct, wilful wrong, malice, oppression or insult is shown, and the structure is seasonably removed. *City Railroad Co. v. Maloney*, 738.

30. *Injury to animal. Wire fence. Right of way.*

If a horse is frightened by a train and runs into a place rendered dangerous by the proximity of a wire fence, erected by the company's consent on the right of way, and a bluff of the cut in which the railroad is laid, and the danger is known to the engineer in charge of the train, and he can do anything which would save the animal from its peril and fails to do it, the company is liable for injuries to the horse resulting from contact with the fence. *Railroad Co. v. Lambuth*, 758.

RAILROAD COMMISSION.

An administrative agency. Findings not conclusive. § 4284, code 1892.

The findings of the railroad commission are, under § 4284, code 1892, not final and conclusive. Although in some respects it exercises quasi judicial power, the commission is an administrative agency, and its conclusions are subject to judicial inquiry. *Telegraph Co. v. Railroad Commission*, 80.

REASONABLE DOUBT.

1. *Dramshop keeper. Suit on bond. Code 1892, § 1582.*

In a suit upon a dramshop keeper's bond, under § 1582, code 1892, it is not necessary for the plaintiff to prove his case beyond a reasonable doubt, but only with reasonable certainty. *State v. Spangler*, 129.

2. *Instruction.*

A reasonable doubt of guilt may arise from the want of evidence as to some fact having a natural connection with the case. *Knight v. State*, 140.

3. *Same. Instruction. Conscientious belief.*

The word "conscientiously" is a word of quality and not of quantity, and ought not to be used in charges as to a reasonable doubt, but if the charge be that the jury, before convicting, must take into consideration all the evidence and "conscientiously" believe, beyond a reasonable doubt, defendant guilty, the word is mere surplusage. *Hammond v. State*, 214.

4. *Same. Good character.*

The influence of evidence showing the good character of defendant should be left to the jury, and the court should not instruct that it is, or is not, sufficient to raise a reasonable doubt of guilt. *Ib.*

5. *Burden of proof. Code 1892, § 1027.*

While the statute places the burden of proof of such defense upon the accused, yet so long as there is a reasonable doubt of guilt, or a probability of his innocence, the state has not satisfactorily made out its case. *Strother v. State*, 447.

6. *Confession. Free and voluntary.*

The court should not admit a confession if it entertains a reasonable doubt as to whether it was free and voluntary. *Hunter v. State*, 515.

7. *Same. Onus probandi. Reasonable doubt.*

It is not the law of homicide that if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder unless he has by his evidence proved excuse or justification; nothing more in such case is required of a defendant than to raise a reasonable doubt of his guilt from the whole evidence. *King v. State*, 576.

8. *Criminal law. Reasonable doubt. Instruction.*

An instruction which undertakes to define a reasonable doubt ought not to be given. *Brown v. State*, 72 Miss., 95; *Burt v. State*, *Ib.*, 408, approved. *Powers v. State*, 777.

RECEIPT.

Contract. Parol evidence.

A receipt may embody the terms of a contract for the appropriation of the payment, as well as acknowledge the reception of the money; and the contract features of such an instrument cannot be varied by parol evidence. *Johnson v. Johnson*, 549.

RECEIVER.

1. *Chancery court. Appointment. Notice. Code 1892, §§ 574, 922.*

When a receiver has been appointed, without notice to the adverse party, by a chancellor other than the one in whose district the cause is pending, it will be presumed, on a recital to that effect in the chancellor's order, that the showing necessary to authorize such action under §§ 574, 922, code 1892, was made by the complainant. *Pearson v. Kendrick*, 235.

2. *Same. Decree discharging receiver. Appeal therefrom. Code 1892, § 575.*

An appeal lies from a decree discharging a receiver appointed without notice on the *ex parte* application of the complainant, since the latter, on the revocation of the appointment, is liable on his bond, given under § 575, code 1892, for all damages sustained by reason of the appointment. *Hanon v. Well*, 69 Miss., 476, distinguished. *Id.*

3. *Deed of trust. Rights of beneficiary. Precarious security. Case.*

The beneficiary in a deed of trust upon property subject to prior liens, that affords but a precarious security for his debt, and is all that the debtor owns, is entitled to have a receiver appointed of the rents and profits to the same extent as if his incumbrance were a mortgage; and it is error to discharge a receiver, on defendant's motion, before final hearing, when the evidence adduced shows such a state of case. *McDonald v. Vinson*, 56 Miss., 497, cited. *Id.*

4. *Assignment for creditors. Judgment creditors. Costs and fees. Receiver. Code 1892, ch. 8.*

An assignee and receiver, under code 1892, ch. 8, where the assignment is made after the rendition and enrollment of a judgment against the assignor, is not, as against the judgment creditor, entitled to withhold commissions, costs and fees incurred in resisting such creditor's demand, out of the proceeds of the assigned property. *Pittman v. Hopkins*, 563.

RECORDING.

1. *Constructive notice. Deed. Trust deed. Record.*

Where a purchaser of land fails to record his deed, but the vendor duly records a deed of trust, given by the purchaser to secure the purchase money, the record of the latter is constructive notice to the trustee and beneficiaries therein of the rights of the purchaser. *Stovall v. Judah*, 747.

2. *Same. Occupation. Unrecorded deed.*

The open, exclusive and continuous occupation of land, under an unrecorded deed, is constructive notice to creditors and subsequent purchasers of the occupant's rights. *Ib.*

REMOVAL OF CAUSE.

1. *To United States court. Jury. Negroes. Discrimination.*

If in the constitution or statutes of a state discrimination is made against negroes on account of race, color or previous condition of servitude, and they are by force thereof excluded from serving on juries, a defendant, whose race is so discriminated against, can remove a criminal prosecution against him to a court of the United States; but if the complaint is that by acts of officers of the state, charged with the administration of impartial laws, discrimination has been made against his race, the defendant must make defense in the state courts, and appeal, if need be, from the final judgment of the highest court of the state to the supreme court of the United States. *Dizon v. State*, 271.

2. *Removal to United States court.*

The state court ceases to have jurisdiction of a cause upon the filing of a petition and bond for the removal of the case to the federal court, only when the petition and bond, taken in connection with the whole record, shows a case that is removable under the acts of congress. *Railroad Co. v. LeBlanc*, 626.

3. *Same. Diverse citizenship. Defendants fraudulently joined.*

The removal of a cause to the federal court, on the ground of petitioner's citizenship of another state, is properly refused, where, in connection therewith, he merely alleges that his co-defendants, like the plaintiff, are citizens of this state, and were fraudulently made defendants to prevent a removal, the case being one in which all of the defendants were sued as joint tort feorsors. *Ib.*

REPLEVIN.

1. *Reservation of title. Failure of consideration. Admissibility of evidence.*

In replevin by the vendor in a contract containing a reservation of title until payment of the purchase money, the vendee or his assignee may defend by proving a failure of consideration, in that the subject of purchase, by reason of latent defects, did not come up to the representations made by the plaintiff at the time of sale, such proof being in legal contemplation the equivalent of payment. *Bloodworth v. Stevens*, 51 Miss., 475; *Bates v. Snider*, 59

Miss., 497; *Gabbert v. Wallace*, 66 Miss., 618; *Dreyfus v. Cage*, 62 Miss., 733, cited. *McKean v. Apparatus Co.*, 119.

2. *Alternate judgment. Code 1892, § 3726. Election.*

If a plaintiff in replevin recover, the judgment, under code 1892, § 3726, should be in the alternative, for the property or its value as found by the jury. The defendant in such case can elect to pay the value and retain the property. *Bond v. Griffin*, 599.

3. *Same. Plaintiff's interest. Instruction.*

If the testimony shows that plaintiff has only a limited interest in the property, an instruction announcing his right to recover should confine the right to the value of such interest. *Ib.*

RES ADJUDICATA.

Decree. Construction. Widow's year's allowance. Code 1892, § 1877.

If, in a suit by the widow and sole heir of a decedent to have his will adjudged invalid, a consent decree be rendered adjudging the will void as to real estate, but valid as to personalty, and decreeing that the widow be paid a certain sum of the proceeds of the personalty, and that the balance of the personalty be paid by the executor to the legatee, "subject to all proper costs, allowances, and expenses," such decree will bar an application by the widow for a year's support, under code 1892, § 1877. *Blackbourn v. Senatobia Educational Asso.*, 852.

REVENUE.

See TAXES.

REVENUE AGENT.

See STATE REVENUE AGENT.

ROADS AND STREETS.

1. *Statutes. Code 1892. Laws 1884, p. 318.*

The act of 1884, p. 318, a special law authorizing the working of public roads in Madison county under contract, was not repealed by the code of 1892. *Madison County v. Stewart*, 160.

2. *Same. Repeals by implication.*

The repeal of statutes by implication is not favored, and when the earlier statute is particular, and the later general, and contains no negative words, the prior statute is not repealed, unless the repugnance is so great as to show clearly a legislative purpose to that effect. *Ib.*

3. *Exemplary damages. Highway. Street railroad.*

Exemplary damages are not recoverable by the owner of a lot against a street railroad company for the erection of a structure in a highway so near plaintiff's lot as to obstruct free passage, where no wanton conduct, wilful wrong, malice, oppression or insult is shown, and the structure is seasonably removed. *City Railroad Co. v. Maloney*, 738.

4. *Municipality. Defective street. Liability. Notice.*

A municipality is liable for an injury suffered by the occupant of a carriage because of defects in its street of which it had due notice. *City of Natchez v. Shields*, 871.

SALE.

1. *Sale of property as subject to waste. Code 1892, § 516.*

That the sheriff, in the progress of the cause, wrongfully sold property, without an order of court, as liable to waste or decay, under § 516, code 1892, is not cause for reversing the final decree in the case. *Day v. Hartman*, 489.

2. *Judicial sales. Caveat emptor. Warranty. Exception.*

The general rule is that judicial sales are made without warranty, and the doctrine of *caveat emptor* is applicable; but this rule should not be enforced so as to compel a purchaser to pay his entire bid after he had been made to satisfy a prior demand against the property, where the whole litigation and sale had proceeded upon the idea that the property was sold freed from incumbrances, and that the proceeds were to be devoted to their satisfaction. *Weems v. Love Mfg. Co.*, 831.

3. *Assignment for creditors. Receiver. Sale. Code 1892, ch. 8.*

In the case of a general assignment, administered under code 1892, ch. 8, where previous attachments have been levied upon the property, a sale made by the assignee-receiver should be of the property freed from the lien of the attachments, and the proceeds should be applied by the court to the payment of the attaching creditors if they prove prior right, they being parties to the chancery suit. *Ib.*

SCHOOL LAND.

Sixteenth sections. Presumption.

In the absence of sufficient evidence, a lease of a sixteenth section, by school trustees, will not be presumed. *Weller & Haas v. Monroe County*, 882.

SEDUCTION.

1. *Reputation. Chastity. Code 1892, § 1298.*

Actual chastity, and not the mere reputation of chastity, constitutes a female the subject of seduction. *Carroll v. State*, 688.

2. *Same. Evidence.*

It is competent, as one of the elements of proof of actual chastity, to show that the woman had the reputation of being chaste. *Ib.*

3. *Witness. Prosecutrix. Contradiction.*

If a question be asked a prosecutrix in seduction whether she had made a certain declaration, and the witness answers, notwithstanding an objection sustained to the question, denying the declaration, and the answer is not excluded, evidence contradicting such answer is admissible. *Ib.*

SIGN, BUSINESS.

See FRAUDS, STATUTE OF.

SLANDER.

1. *Words actionable per se. Poisoned.*

To charge the defendant with having poisoned the plaintiff is actionable *per se*. *Furr v. Speed*, 423.

2. *Same. Peremptory instruction.*

If there be a conflict of evidence as to whether the words charged in an action for slander were spoken, it is proper to refuse a peremptory instruction for the plaintiff. *Ib.*

3. *Same. Damages.*

It is not error, in an action for slander, to refuse plaintiff an instruction to the effect that proof of damage is unnecessary, when the same fails to state that the jury must believe that the slanderous words were spoken by defendant. *Ib.*

4. *Same. Intention.*

Both intention to injure and damage are implied by law from the speaking of words which are slanderous *per se*. *Ib.*

5. *Same.*

If the defendant is shown to have charged plaintiff with having poisoned him, an instruction that before plaintiff can recover, the jury must believe that defendant spoke the words with the intent to say that the plaintiff intentionally poisoned him, is erroneous. *Ib.*

6. *Same. Proof.*

A recovery in an action for slander can be had only where the words charged, or synonymous words, are proved to have been spoken. *Ib.*

SLEEPING CAR.

Legal character. Laws of Illinois.

Under the constitution of this state, all sleeping car companies are common carriers, but they are not technically so by the laws of Illinois. *Pullman Car Co. v. Lawrence*, 782.

STATE LAND.

1. *Internal improvement lands. Grant to state. Selection.*

Title to the internal improvement lands, granted to the state by act of congress, September 4, 1841, was vested in the state on selection, by its direction, of lands subject to location under the act. *Godwin v. Davis*, 742.

2. *Same. Irregularities.*

Irregularities in the state's selection of lands under act of congress, September 4, 1841, cannot avail a litigant who does not claim the land under either the United States or this state. *Ib.*

3. *Same. Sale by state. Irregularities. Laws 1878, p. 218.*

The validity of the state's patent to lands acquired under act of congress, September 4, 1841, which is made under laws of 1878, p. 218, cannot be questioned by one who does not claim under the United States or this state. *Ib.*

STATE REVENUE AGENT.

Costs. Code 1892, §§ 4194, 4199.

Where judgment is obtained by the state revenue agent for money and costs, and a sum is realized on execution insufficient to satisfy the whole, the officers of the court may retain their costs out of the collection; and code 1892, §§ 4194, 4199, does not authorize the state revenue agent to demand the entire collection, leaving the costs unpaid. *Adams v. Evans & Co.*, 886.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

STATUTES (OTHER THAN CODE SECTIONS) CONSTRUED.

- 1842, p. 213. County warrants. Registration under act. *Taylor v. Chickasaw County*, 23.
- 1858, p. 32. Taxation. Lands outside of levee. *Owens v. Railroad Co.*, 821.
- 1867, p. 237. Taxation. Lands outside of levee. *Owens v. Railroad Co.*, 821.
- 1871, p. 57. Taxation. Lands outside of levee. *Owens v. Railroad Co.*, 821.
- 1884, p. 166. Eminent domain. Levee board. Rights of mortgagee. Notice. *Levee Board v. Wilborn*, 396.
- 1884, p. 318. In relation to public roads in Madison county. Not repealed by code of 1892. *Madison County v. Stewart*, 160.
- 1888, pp. 15, 16. Banks. Privilege tax. Exemption. *Bank v. Adams*, 179.
- 1888, p. 40. Taxation. Lands outside of levee. *Owens v. Railroad Co.*, 821.
- 1888, p. 118. Stock law fence. Railroad right of way. Taxation. *Adams v. Railroad Co.*, 331.
- 1888, p. 218. Internal improvement lands. Grant to state. Selection. *Godwin v. Davis*, 742.
- 1894, p. 28. Assessor. Additional compensation. Discretion of supervisors. *Williams v. Sharkey County*, 122.
- 1894, p. 95. Practice. Lands taken for levee purposes. Exclusive remedy. *Owens v. Levee Commissioners*, 269.
- 1896, pp. 91, 93. Bills of exceptions. Stenographer's notes. Agreement of attorneys. *State v. Spangler*, 129; *Sanders v. State*, 531.
- 1896, p. 97. Railroads. Engineer. Defective appliance. Code 1892, § 3559, amended. *Railroad Co. v. Guess*, 170.

STOCK LAW.

1. *Railroads. Landowner. Right of way. Not subject to fence tax. Act 1888, p. 118.*
 A railway company is not, as to its right of way, a landowner in the sense in which that term is employed in the Act of March 9, 1888 (Laws, p. 118), whereby boards of supervisors are authorized to levy a special tax on all landowners of any stock law district established thereunder. *Adams v. Railroad Co.*, 331.
2. *Railroads. Live stock on track. Stock law district. Code 1892, § 1808.*
 Though live stock may, in a stock law district, be wrongfully at large and trespassing on a railroad track, yet, under § 1808, code 1892, the railroad company is *prima facie* liable to the owner for

injury to an animal inflicted by the running of its locomotives or cars. *Roberds v. Railroad Co.*, 334.

3. *Same. Peremptory instruction.*

Where an animal is killed or injured by the running of railroad locomotives or cars, even if the animal were unlawfully at large and trespassing on the track, yet a peremptory instruction for defendant should not be given if there be evidence showing, or tending to show, that the injury might have been avoided by the exercise of reasonable care after the animal was seen by defendant's servants in charge of the train. *Ib.*

STREETS.

See ROADS AND STREETS.

STREET RAILROADS.

See RAILROADS; DAMAGES.

SUBROGATION.

1. *Principal and surety. Creditor. Indemnity. Security.*

A security given by a principal to his surety, which is not conditioned to secure the debt, but merely to indemnify the surety, cannot be enforced by the creditor. *Clay v. Freeman*, 816.

2. *Same. Contingent liability.*

Even if the security in such case is conditioned to pay the debt if it provides for its enforcement only upon a certain contingency, it is a mere indemnity, and can be enforced only according to its stipulations. *Ib.*

SUPREME COURT.

1. *Reversal. Jurisdiction. Dismissal of cause on appeal.*

On the reversal of a final decree in a cause of which the chancery court had no jurisdiction, the appellate court, instead of remanding the cause to the court having jurisdiction thereof, will dismiss the same when it appears from the evidence that the complainant has no cause of action. *Griffin v. Byrd*, 32.

2. *Reversal. Jurisdiction. Constitution 1890, § 147.*

If the chancery court overrules a demurrer to a bill in equity raising the question of its jurisdiction to subject specific property to the payment of a judgment at law, the record of which judgment has been destroyed, the supreme court cannot, under the constitution, § 147, review such question, there being no other error found in the record. *Day v. Hartman*, 489.

3. *Error. Sale of property as subject to waste. Code 1892, § 516.*

That the sheriff, in the progress of the cause, wrongfully sold property, without an order of court, as liable to waste or decay, under § 516, code 1892, is not cause for reversing the final decree in the case. *Ib.*

4. *Jurisdiction. Attachment for rent. Amount in controversy. Code 1892, § 85.*

Upon an appeal to the supreme court from a judgment of the circuit court, in favor of a landlord, in an action of replevin by the tenant for property distrained for rent, begun in a justice's court, the amount in controversy is determined by the rent due, as adjudged by the circuit court, and not by the value of the property seized. *Biddle v. Patne*, 494.

5. *Evidence. Erroneous admission. Reversal.*

If a plaintiff so far fails to make out his case that a peremptory instruction could rightfully be given against him, he cannot reverse the judgment for defendant because the trial court permitted defendant to introduce incompetent evidence. *Blackwell v. Graham*, 595.

6. *Suggestion of error. Effect of filing.*

An action for a second enforcement of a statutory penalty, on the ground of a continuance of the wrong, is premature when brought on the day of the disallowance, by the supreme court, of a suggestion of error to its judgment in a prior suit establishing plaintiff's right to the penalty, no reasonable time to repair the wrong being afforded the defendant. *Railway Co. v. Odeneal*, 827.

TAXES.

1. *Assessor. Fees of. Laws 1894, p. 28.*

The additional compensation, not exceeding ten cents for each individual assessed on the personal roll, may or may not be allowed, within the discretion of the board of supervisors. *Williams v. Sharkey County*, 122.

2. *Assessment. Misdescription. Parol evidence. Collateral attack.*

In the absence of fraud, a misdescription in a perfected and approved assessment cannot, in a collateral attack, be shown by parol. *Bank v. Adams*, 179.

3. *Same. Incomplete, etc. Direct attack.*

Misdescription may be so shown if the assessment be incomplete and is undergoing direct adjudication. *Ib.*

4. *Same. Banks. Privilege tax. Laws 1888, pp. 15, 16.*

Under the act of 1888 (Laws pp. 15, 16), the payment of a proper privilege tax exempted a bank from *ad valorem* taxes. *Ib.*

5. *Same. Lists rendered by taxpayers. List made by assessor.*

The assessment is the list made by the assessor, and it is not constituted of the lists rendered him by the taxpayers. *Ib.*

6. *Same. Judgments on appeals from assessments. Damages. Code 1892, § 4360.*

A judgment determining the liability of property to taxation and fixing its value, is not, on appeal to the supreme court, within § 4360, code 1892, imposing damages. *Ib.*

7. *Poll tax. Distress. Nontaxable property. Section 243, constitution 1890.*

Property which is exempt from taxation cannot be distrained to coerce the payment of a poll tax due from the owner, sec. 243 of the constitution of 1890 providing that the poll tax shall be a lien only on taxable property. *Ratliff v. Beale, 247.*

8. *Municipal ordinances. Construction. Surplusage.*

A municipal ordinance fixing in its first section a rate of taxation on all property, except banks and solvent credits, and by its second section fixing a lower rate on banks and solvent credits, cannot be held to impose the greater rate on banks. The exception in the first section and the second section cannot be treated as surplusage. *Adams v. Bank, 307.*

9. *Same. Municipal taxes. Variant rates.*

If a municipality be without power to impose a lesser rate of taxation on a class of property than that imposed on property generally, and yet attempts to do so by ordinance, if the ordinance be not wholly void, the aggrieved parties are those upon whose property the greater burden was sought to be imposed. *Ib.*

10. *Taxation. Levy. Payment.*

A levy of a tax is indispensable to create a legal obligation to pay it. A taxpayer who has paid all taxes undertaken to be imposed upon his property, is not in default for not having paid more thereon. *Ib.*

11. *Railroads. Stock law. Landowner. Right of way. Not subject to fence tax. Act 1888, p. 118.*

A railway company is not, as to its rights of way, a landowner in the sense in which that term is employed in the act of March 9, 1888 (Laws, p. 118), whereby boards of supervisors are authorized

to levy a special tax on all landowners of any stock law district established thereunder. *Adams v. Railroad Co.*, 331.

12. *Levee taxes. Lands outside of levee not liable. Laws of 1858, p. 32; laws of 1867, p. 237; laws of 1871, p. 57; laws of 1888, p. 40, construed.*

Lands lying between the Mississippi river and the levees built for protection against the waters thereof are not, under any law of this state, subject to taxes imposed for the construction of such levees or to meet liabilities incurred therein. *Owens v. Railroad Co.*, 821.

TAX COLLECTOR.

1. *Advertisement of land. Code 1892, § 3811.*

Under § 3811, Code 1892, if the taxes on lands are unpaid after the fifteenth day of January, the tax collector is vested with a limited discretion as to when the advertisement of the lands for sale is to be made. He may advertise them on the sixteenth day of January, or any succeeding day, so that they are advertised for three weeks before the day of sale. *Müller v. Land Co.*, 110.

2. *Same. Fees, ten per centum damages. Code 1892, § 2021.*

Under § 2021, Code 1892, a tax collector is entitled to ten per centum on all taxes not paid until after December 15 and after legal action has been begun to coerce payment, and legally advertising the property for sale is such action. *Ib.*

3. *Same. Injunction.*

The tax collector will not be enjoined from collecting the ten per centum provided by law on the grounds that the publication could have been begun later, and that the collector knew the taxes would be paid. *Ib.*

4. *Same. Payment after action begun.*

Though a tax collector's proceedings to enforce collection be interrupted by payment of the taxes, he will be entitled to the per centum because of coercive action begun. *Ib.*

TAX TITLES.

1. *Redemption. Limitation of act of 1888. Laws, p. 40.*

The act of March 2, 1888, entitled "An act to quiet and settle the title to certain lands in the Yazoo delta," etc. (Laws, p. 40), relates entirely to title, and the right of the owner of lands sold for taxes to redeem the same within one year after attaining his ma-

jority, is not affected by the provision of said act barring all proceedings for the recovery of any of said lands against one who has occupied the same for twelve months after the passage of said act, under a deed from the commissioners in *Green v. Gibbs*, or the auditor's deed designated in said act. *Boddie v. Pardee*, 13.

2. *Ambiguous description. Pleading. Code 1880, § 491.*

Where the complainant, in a bill for the cancellation of a tax title, avers his ownership of a tract of land by a valid description and identifies it as the delinquent land assessed by an ambiguous description, and so sold and conveyed for taxes, and purchased by the defendant, the description in the assessment roll and tax deed is, by these averments, so applied to the particular tract as to call for no response in defendant's answer or the adduction of parol evidence, under § 491, code 1880, to apply the same thereto; and this effect of said averments is not obviated by complainants' use of the words "pretended sale" in referring to the sale for taxes. *Mixon v. Clevenger*, 67.

3. *Same. Assessment. Approval of roll. Order that roll be "received as corrected."*

When the minutes of the board of supervisors show that an assessment roll had been already received and taken up for examination and correction, a subsequent order entered thereon that the roll be "received as corrected," necessarily means that the board thereby finally approved the corrected roll. *Mills v. Scott*, 62 Miss., 525; *Grayson v. Richardson*, 65 *Ib.*, 222, cited. *Ib.*

4. *Same. Officer participating in sale grantee in tax deed. Interest acquired after sale.*

That a deputy of the tax collector, after the land had been bid off by a purchaser at a tax sale, acquired an interest therein by contract with such purchaser before the money was paid, the tax deed being made to them jointly, does not invalidate the sale, by reason of the assumed incapacity of the deputy to buy at a tax sale in the making of which he participated. *Ib.*

5. *Same. Tax collector's deed. Prima facie validity of sale. Code 1880, § 526.*

The testimony of a tax collector that he did not see how he could have sold a tract of land at tax sale in the smallest legal subdivisions, as required by law, unless he had a map of it, and that he did not remember that he had a map, is insufficient to overcome the effect of his deed, under § 526, code 1880, as "prima facie evidence that the assessment and sale of the land were legal and valid." *Ib.*

6. *Same. Irregularities attending sale. Testimony of the tax collector inadmissible.*

The testimony of a tax collector that he failed to offer a tract of land sold by him for taxes in the smallest legal subdivisions, as required by law, is inadmissible, as going to impeach his own official conduct. *Ib.*

7. *Invalid sale. Insufficient description.*

A tax collector's sale of land, not otherwise described than as "37 acres in the N. $\frac{1}{4}$ of Sec. 1, T. 13, R. 4," is void for uncertainty. *Sims v. Warren*, 67 Miss., 278, cited. *Nelson v. Abernathy*, 164.

8. *Same. Sale in subdivisions. Duty of collector. Code 1892, § 3813.*

A tax collector who sells a tract of land embracing several legal subdivisions of forty acres each, does not comply with § 3813, code 1892, by offering first one of said subdivisions and then each succeeding one as an independent subject of sale, until the amount due is produced, but should add each succeeding subdivision to the parcel or aggregate of the parcels already offered. *Ib.*

9. *Same. Failure to designate subdivision offered. Void sale. Code 1892, § 3813.*

A tax sale of a tract of land containing several legal subdivisions of forty acres each, is void, when the collector, in offering the same for sale under § 3813, code 1892, fails to designate the several subdivisions by their proper descriptions. *Hodge v. Wilson*, 12 Smed. & M., 498, cited. *Ib.*

10. *Same. Curative statute. Ineffectual as to void sale. Code 1892, § 3817.*

A tax sale that is void by reason of the failure of the collector to designate the several forty-acre legal subdivisions composing the tract sold by their proper description at the time of offering the same, is not cured by the provision in § 3813, code 1892, that "no error in conducting the sale shall invalidate it," nor by § 3817 of the same code, to the effect that his conveyance shall not be invalidated, "except by proof that the land was not liable for the taxes or that the taxes for which the land was sold had been paid before sale" (*Virden v. Bowers, Ib.*, 26; *Griffin v. Ellis*, 63 Miss., 348) nor by the constitutional provision assimilating tax sales to sales under execution. *Gamble v. Witty*, 55 Miss., 36, cited. *Ib.*

11. *Tax sale. How land offered. Code 1880, § 521.*

Under the code 1880, § 521, it was the duty of the tax collector, in making sale for delinquent taxes of a tract of land constituting one body, assessed and described by United States survey descriptions, to first offer forty acres and sell it for the taxes due on the whole tract if he could; if it failed to bring the taxes due on the

whole tract, then he should have added forty acres and offered eighty acres and have sold that for the taxes due on the whole if he could; failing in this, he should have added forty acres and offered one hundred and twenty acres; and so on, adding forty acres at a time, until the whole taxes were bid; and he should have designated each time he made an offer the land offered; and the whole tract should not have been sold until he had offered the parts as above stated and failed to receive a bid covering the taxes on the whole. *Gregory v. Brogan*, 694.

12. *Same. Separate assessments. Same person.*

The above was true, under code 1880, § 521, even where the land constituting one tract was assessed to the same person in separate assessments. *Ib.*

13. *Same. Wrongful sale.*

A sale of land made in March, 1892, for the taxes of 1891, in violation of code 1880, § 521, was void. *Ib.*

14. *Confirmation. Defendant's title.*

The complainant who seeks to confirm a tax title cannot recover because of any defects in the title of one whom he has made a defendant to his suit; he must recover, if at all, on the validity of his own title. *Ib.*

15. *Invalidity. Recovery of taxes paid. Lien.*

A purchaser at tax sale, who pays taxes, believing the land to be his own, can, after his title is defeated by the real owner, enforce a lien on the land for the amount of the taxes paid by his purchase, and subsequently paid by him before the invalidity of his claim is adjudicated. *Reid v. Railroad Co.*, 769.

TELEGRAPH COMPANY.

1. *Telegraph company. State police regulations.*

A telegraph company, engaged in domestic as well as interstate business, is subject to such reasonable police regulations as the state may impose. *Telegraph Co. v. Railroad Commission*, 80.

2. *Same. Chartered by another state. Lines erected by authority of congress.*

In such case it is immaterial that the company was chartered by another state and secured its right to erect its lines along the post roads in this state under an act of congress. *Ib.*

TENANT IN COMMON.

1. *Purchase by co-tenant. Equity. Illegal act.*

A tenant in common who in the prosecution of a scheme to acquire the interests of her co-tenants causes her husband to buy the land for her sole benefit at tax sale, the conveyance being made to the husband, cannot, as against his attaching creditors, maintain a bill to enforce a resulting trust in the land on the ground that her money was used in the purchase. *Snider v. Udell Woodenware Co.*, 353.

2. *Purchase by co-tenant. Innocent party.*

A tenant in common who purchases the joint estate under a deed of trust will hold the same as trustee for all the tenants; but adult co-tenants, with knowledge or sufficient information to charge them with knowledge, must elect within a reasonable time, to hold the purchaser as a trustee, otherwise, those who acquire rights in the property from him in good faith will be protected. *Smith v. McWhorter*, 400.

TENDER.

Mortgage. Bill to redeem.

If the object of a bill in equity be to redeem, and not to cancel, a mortgage, a previous tender of the sum due is unnecessary, where complainant is unable to know, because of defendant's fault, what sum is due upon the mortgage debt. *Mortgage Co. v. Jefferson*, 69 Miss., 464, distinguished. *Aust v. Rosenbaum*, 893.

TORTS.

1. *Cause of action. Laws governing.*

Whether or not an *ex delicto* cause of action exists upon a state of facts, is to be determined by the law of the place where the matters complained of occurred. *Pullman Car Co. v. Lawrence*, 783.

2. *Tort by agent. Ratification by principal.*

If a defendant corporation be advised by one of its superior agents of a tort against a stranger committed by a subordinate agent, and strenuously endeavors to prove that the act of its subordinate agent was not tortious, and, when sued for the wrong, makes an unwarranted and violent attack on the conduct and character of the plaintiff, a verdict against it is justified on the ground of its having ratified the wrong. *Id.*

3. *Excessive damages.*

There is no fixed standard for measuring damages in actions for torts. Each case must depend largely on its own facts. *Ib.*

TRESPASS.

1. *License to use land. In whose favor good. Trespass.*

A license to use land is good only to those in whose favor and for whose use it is given. Every entry upon the land of another without lawful authority is a trespass, whether the land be inclosed or not, and whether appreciable damage be done or not. *Agnew v. Jones*, 347.

2. *Same. Entry to take one's own personality.*

It is a trespass to enter the land of another, without his consent, to take one's own personal property. *Ib.*

3. *Disseizee. Re-entry. Right to sue. Stranger.*

The true owner of land, who has been dispossessed, may, after re-entry, maintain trover or trespass *de bonis asportatis*, for trees cut from his land while he was out of possession, and he may so sue the disseizor, his vendees, or strangers. *Trust Co. v. Hardwood Co.*, 584.

4. *Pleading. Hilary rules. Not guilty.*

Hilary rules of pleading are not in force in this state, and a plea of not guilty in trespass does not admit possession; and it does not, in trespass *de bonis asportatis* or trover, admit plaintiff's title. *Ib.*

5. *Good faith of trespasser. Measure of damages.*

Where defendant, in good faith, believing he owned the land, cut trees therefrom, he is liable to the real owner only for the value of the trees at the time of the taking. *Illinois, etc., R. R. Co. v. LeBlanc*, post, p. 626. *Bond v. Griffin*, 599.

TROVER.

1. *Disseizee. Re-entry. Right to sue. Stranger.*

The true owner of land, who has been dispossessed, may, after re-entry, maintain trover or trespass *de bonis asportatis*, for trees cut from his land while he was out of possession, and he may so sue the disseizor, his vendees, or strangers. *Trust Co. v. Hardwood Co.*, 584.

2. *Pleading. Hilary rules. Not guilty.*

Hilary rules of pleading are not in force in this state, and a plea of not guilty in trespass does not admit possession; and it does not, in trespass *de bonis asportatis* or trover, admit plaintiff's title. *Ib.*

TRUSTS.

1. *Parol trust. Revocable trust. Contingency of death. Interest of beneficiary.*

Where the insured in a life policy payable to himself, his administrators, executors or assigns, transfers the same to a third person as collateral security for a small loan, with directions that, in case anything should happen to him (construed to mean in case of his death) while the loan remained unpaid, such person should collect the policy, and, after deducting the amount of his loan, divide the balance of the proceeds between the wife and child of the insured, a parol trust is created in favor of the wife and child, whereby they acquire an interest *in present*, and, on the death of the insured without revoking the trust, such interest becomes absolute as against his administrator, in a proceeding not involving the rights of creditors of the insured. *Hiserodt v. Hamlett*, 37.

2. *Resulting trust. Payment of purchase money. Time of payment.*

The rule that a resulting trust in land can only arise in favor of a third person paying the purchase money, when it is paid "at the time of the purchase," means that the payment must be made at or before the time of the conveyance whereby the vendee acquires title. *Moore v. Moore*, 59.

3. *Same. Case.*

Where one enters into a contract for the purchase of land, paying a part of the price, and giving his notes for the remainder, the payment of which is a condition precedent to the conveyance of the land, and his wife, upon a subsequent agreement that she shall be substituted as vendee, pays the notes, but the vendor, in ignorance of this arrangement, conveys the land to the husband, who fully recognized his wife's right to the land and often promised to correct the mistake, but died soon afterwards without having done so, a trust results in favor of the wife, and she is entitled to the land as against the husband's heirs at law, the payment by the wife, under the agreement stated, having been prior to the conveyance by the vendor. *Ib.*

TRUST DEED.

See MORTGAGE AND DEED OF TRUST.

UNLAWFUL DETAINER.

Purchaser at execution sale. Tenant of defendant in execution. Purchaser an assign. Code 1892, § 4461.

Under § 4461, code 1892, a purchaser of land at execution sale may maintain the action of unlawful detainer against a tenant of the defendant in execution, who "withholds possession after the expiration of his right," the purchaser having become, by the act of the law, the "assign of him who is so deprived of possession, or from whom possession is so withheld." *Glenn v. Caldwell*, 49.

UNLAWFUL SALE OF LIQUORS.

See LIQUORS, SALE OF.

USURY.

See INTEREST AND USURY.

VENDOR AND VENDEE.

1. *Vendor's lien.*

There exists no vendor's lien in favor of a complainant (as distinguished from a lien reserved by contract) when it appears that the note sued on was the price of the land sought to be subjected and certain personalty in gross, or that the land was sold for one sum and the personalty for another, the latter being evidenced by said note, for in neither case is there a fixed sum due from the vendee to the vendor as the purchase money of the land. *Griffin v. Byrd*, 32.

2. *Junior incumbrancer. Lien extinguished.*

The owner of a prior deed of trust on personal property to secure a sum greater than the value of the property, may acquire the property from the grantor in his deed freed from a junior lien on the same property. *Gross v. Outts*, 357.

3. *Same. Innocent purchaser. Extent of right.*

If a purchaser be a *bona fide* one for value, he is entitled not alone to be saved harmless to the extent of his money paid, but should be protected in the fruits of his bargain. *Ib.*

4. *Title to land. Grantees of county. Estoppel.*

Purchasers claiming title to land under a deed from a county, cannot, in a suit by the county to cancel their deed, defend on the ground that the county was at the time of its purchase without power to acquire the property. *Jefferson County v. Grafton*, 435.

5. *Same. Power to sell land.*

A county is not a municipal corporation proper, and, before § 304, code 1892, became operative, was not authorized to sell land, though the same was not applied to a public use. *Ib.*

VENUE.

Actions in personam.

The venue of actions *in personam* is "in the county in which the defendants, or any of them, may be found." *Campbell v. Triplett*, 365.

VERDICT.

Excessive verdict. Shocking to conscience.

A verdict which is so excessive as to shock the conscience should be set aside by the court. *Railroad v. LeBlanc*, 626.

WAGES.

See LIEN, AGRICULTURAL.

WAIVER.

Note for wages. Lien of employe.

The taking of a promissory note for such wages is not necessarily a waiver of the lien; the question of waiver is one of fact, and the intention of the employe in taking the note may be the subject of evidence, but a direct agreement is not necessary to a waiver. *Powell v. Smith*, 142.

WARRANTS, COUNTY.

1. *Registration under act of 1842 (Laws, 213). Presentation within one year. Validity dependent thereon.*

The act of February 25, 1842 (Laws, p. 213), providing for the presentation for registration of county warrants within one year from their date, is not a statute of limitation, but the imposition of a condition, the performance of which is essential to their validity. *Taylor v. Chickasaw County*, 23.

2. *Pleading. County warrants judgments. General issue nul tiel record. Limitation upon rule. Code 1871, § 1382.*

Nul tiel record is the only proper plea of the general issue to a demand based upon valid and duly registered county warrants issued prior to the enactment of § 1382, code 1871 (code 1880, § 2160; § 322, code 1892), there being no limitation upon the rule recognizing

such warrants as judgments and exempting them from collateral attack prior to the enactment of said section. *Ib.*

WARRANTY.

See DEED AND SALE.

WATERS.

1. *Railroads. Waters. Obstructions. Overflow. Former recovery.*

An action against a railway company for such damage as has resulted to the upper of two adjoining tracts of plaintiff's land from overflow, caused by an insufficient culvert and the erection of an embankment, is not barred by reason of his assignor's previous recovery of damages for the total destruction in value of the lower tract from the same cause. *Railroad Co. v. Wilbourn*, 284.

2. *Same. Peremptory instruction.*

It is the province of the jury to determine whether, or not, the injurious effects of the manner in which the natural flow of water has been obstructed by a railway company, are consistent with a due regard by such company for the rights of adjacent proprietors in the construction of its road. *Ib.*

3. *Same. Erroneous instruction.*

It is error, in an action for damages to plaintiff's lands resulting from an overflow, caused by an insufficient culvert and an embankment constructed by the defendant railroad company, to instruct the jury that the "plaintiff had the right to have the water, whether rain water or spring water, flow as they naturally would have flowed without any obstruction by the railroad," for an interference with the natural flow of water incident to a proper construction and use of its roadbed, imposes no liability upon the defendant. *Ib.*

WEIGHT OF EVIDENCE.

See EVIDENCE.

WILLS.

1. *Devise to heir at law. Common law rule. When inapplicable.*

The rule of the common law that a devise is void whenever the heir at law would take thereunder the same estate in quality that he would otherwise take by descent, is invoked to no purpose when the will contains other provisions with which its application does not consist. *Dunlap v. Fant*, 197.

2. *Same. Estate for life. Vested remainder. Defeasance.*

When, by the terms of his will, a testator, who has several children, devises his real estate to his wife for life, with remainder over at her death to such of his lawful heirs as may then be alive, and the children of such as may have died, *per stirpes*, and directs that the property shall not be divided or disposed of until one of his daughters attains her majority or marries, the children of the testator take, by purchase, vested remainders, subject to defeasance by their deaths during the continuance of the life estate, and the descendants of such of them as have died during the same time also take by purchase as ulterior limitees, and not as heirs of the testator. *Ib.*

3. *Same. Sale under execution. Right of purchaser. Defeasance of remainderman's interest.*

When a vested remainder is defeated by the death of the remainderman during the continuance of the particular estate, his judgment creditor has acquired nothing by a previous purchase of his interest at execution sale. *Ib.*

4. *Construction.*

The true rule for the construction of a will is to ascertain the intention of the testator from the will itself—the whole will taken together, including codicils, if there be any. *McGehee v. McGehee*, 386.

5. *Same Revocation. Codicil.*

Where a devise or bequest in a will is clear and free from doubt, the intention to revoke by a codicil must be equally clear and explicit in order to work a revocation. *Ib.*

WITNESS.

1. *Female witness. Character for truth. Chastity.*

The character of a female witness for truth may not be impeached by showing her to be of probable unchaste character. (Whitfield, J., *dubitante*.) But if a party show by his own female witness that the witness was seen in a brothel, and facts tending to show that she was entrapped therein by his adversary, the whole matter may be inquired into. *Tucker v. Tucker*, 93.

2. *Deed. Delivery. Code 1892, § 1740.*

Notwithstanding the death of the grantor in a deed, the testimony of the grantee in his own behalf is admissible to prove the delivery of the instrument as against one claiming under the same grantor by subsequent special warranty deed, a failure of the latter title

imposing no liability on the decedent's estate. *Horne v. Nugent*, 102.

3. *Practice. Witness fees. Commitment. Per diem allowable. Code 1892, §§ 1987, 2023 to 2026 inclusive.*

A witness for the state in a criminal prosecution who has been committed to jail to secure his appearance before the circuit court, is not, under §§ 1987 to 2026 inclusive, code 1892, entitled to a per diem allowance of fees for the whole period of his detention, but only for that covered by his attendance upon the court when in session. *Marshall County v. Tidmore*, 317.

4. *Examination. Practice. Discretion.*

Witnesses in rebuttal should be confined to matters in rebuttal, and not allowed to repeat their evidence in chief; but this matter is largely in the discretion of the court. *King v. State*, 576.

5. *Prosecutrix. Contradiction.*

If a question be asked a prosecutrix in seduction whether she had made a certain declaration, and the witness answers, notwithstanding an objection sustained to the question, denying the declaration, and the answer is not excluded, evidence contradicting such answer is admissible. *Carroll v. State*, 688.

E. J. M.

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